

## DEPARTMENT OF AGRICULTURE

## Forest Service

## 36 CFR Part 223

RIN 0596-AB22

**Sale and Disposal of National Forest System Timber; Administration of Timber Export and Substitution Restrictions**

AGENCY: Forest Service, USDA.

ACTION: Final rule with request for comments.

**SUMMARY:** This final rule implements the Forest Resources Conservation and Shortage Relief Act of 1990 (Act). It defines certain terms necessary to facilitate uniform compliance; prohibits transfer of unprocessed private timber for export by a person who possesses or acquires unprocessed Federal timber; prohibits export of such unprocessed private timber by a third or successive parties; prescribes procedures for reporting the acquisition and disposition of Federal and private timber, including transfers; prescribes procedures for identifying unprocessed Federal and private timber requiring domestic processing; establishes procedures for assessing civil and criminal penalties and applying administrative remedies for violations of the Act, its implementing regulations, and contracts issued under the Act; and authorizes Regional Foresters' entry into cooperative agreements with other agencies.

This comprehensive rule incorporates, with some changes, the provisions of the interim rule published November 20, 1990 (55 FR 48572) which established sourcing area procedures; continued surplus species determinations; and continued the existing reporting procedures applicable to timber sale contracts awarded prior to August 20, 1990. This comprehensive rule also incorporates the final rule of limited scope, published December 19, 1991 (56 FR 65834), which: Continued the existing reporting procedures applicable to timber sale contracts awarded prior to August 20, 1990; amended the interim rule for sourcing area disapproval and review procedures; and established application procedures for persons applying for a share of the limited amount of unprocessed timber originating from National Forest System lands in the State of Washington that are exempted from the prohibition against indirect substitution. This comprehensive rule also establishes the specific quotas for indirect substitution in Washington State. This

comprehensive rule fully implements the Act, except for the determination of surplus species, pursuant to 16 U.S.C. 620a(b). The intended effect of this rule making is to conserve public timber resources and help relieve domestic timber supply shortages by implementing the provisions of the Forest Resources Conservation and Shortage Relief Act of 1990.

Given the scope of this final, comprehensive rule making, the Department is seeking public comment on any "fine tuning" of the regulations that may be necessary for more efficient implementation. This request for public comment in no way affects the finality of this rulemaking.

**DATES:** This rule is effective September 8, 1995. Comments must be received in writing by October 10, 1995.

**ADDRESSES:** Send written comments to Jack Ward Thomas, Chief (2400), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090.

The public may inspect comments received on this final rule in the Office of the Director, Timber Management Staff, Forest Service, USDA, 201 14th Street SW., Washington, DC 20250, between the hours of 8:30 a.m. and 4:30 p.m. Parties wishing to view comments are encouraged to call ahead ((202) 205-0893) to facilitate entry into the building.

**FOR FURTHER INFORMATION CONTACT:** Rex Baumbach, Timber Management Staff, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090, (202) 205-0855.

**SUPPLEMENTARY INFORMATION:****Statutory and Regulatory Background**

The Forest Resources Conservation and Shortage Relief Act of August 20, 1990 (16 U.S.C. 620, *et seq.*), hereafter referred to as the Act, prohibits the export of unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States and restricts direct and indirect substitution of unprocessed Federal timber for timber exported from private lands. Prior to the passage of the 1990 Act, the prohibitions against exporting unprocessed timber harvested from Federal lands had been renewed annually by the Appropriations Act for Interior and Related Agencies, under which Forest Service programs are funded. The Act replaces this annual renewal requirement for contracts awarded on or after the date of enactment of the Act. The specific limitations established in the new Act are described under the applicable regulatory sections.

To meet certain statutory deadlines, the Forest Service published a notice of statutory restrictions in the **Federal Register** on September 17, 1990, (55 FR 36123) followed by publication of several rules, a summary of which follows:

1. An interim rule was published November 20, 1990, (55 FR 48572) to comply with statutory requirements which took effect before this final rule could be issued. The interim rule contained definitions necessary to facilitate uniform compliance, procedures for certifying exemption of a person from the prohibitions against substitution if that person had exported unprocessed private timber in the previous 24 months, and sourcing area application procedures. It also continued the status of existing surplus species until the Secretary could receive public comments and make new surplus species determinations, and continued reporting procedures in effect for contracts awarded prior to enactment of the Act.

2. A proposed comprehensive rule was published January 29, 1991, (56 FR 3354) to fully implement the Act. This proposed rule included procedures for monitoring compliance with the Act and enforcing the prohibition against indirect substitution. Also included were procedures for reporting the acquisition and disposition of unprocessed timber, for documenting transfers, for identifying and marking Federal and private timber required to be domestically processed, procedures for assessing civil and criminal penalties and applying administrative remedies for violations of the Act; revised regulations for debarment and contract suspension, definitions necessary to assure uniform compliance with the Act, provisions for cooperating with other agencies, and procedures for determining surplus species.

3. A proposed rule of limited scope was published January 29, 1991, (56 FR 3375) to implement certain provisions required to take effect before this final comprehensive rule could be adopted. The proposed rule contained regulations for continuing the reporting requirement in timber sale contracts awarded prior to August 20, 1990, establishing sourcing area disapproval and review procedures, and establishing application procedures for indirect substitution prohibition exceptions for persons who acquired unprocessed timber from National Forest System lands in the State of Washington. The final rule of limited scope was issued December 19, 1991 (56 FR 65834).

4. A final rule delegating the Secretary of Agriculture's authority to make the

final decision on sourcing area applications received by December 20, 1990 to the Department's Office of Administrative Law Judges (OALJ) was published April 5, 1991 (56 FR 14009);

5. A final rule was published on May 14, 1991 (56 FR 22105), amending the Department's rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes to include log export and substitution disputes arising from the Act.

6. A final rule was published on April 2, 1992 (57 FR 11261), which delegates the Secretary's authority to adjudicate sourcing area applications received after December 20, 1990 to the Department's Office of Administrative Law Judges and the Judicial Officer.

7. A final rule was published on February 24, 1994 (59 FR 8823), which establishes the procedures for adjudicating and reviewing sourcing areas.

This final rule, in combination with the final rule published December 19, 1991, (56 FR 65834) completes the implementation process, except for the determination of surplus species pursuant to 489(b) of the Act (16 U.S.C. 630a(b)).

*Contents of comprehensive rule.* This final rule contains the following:

1. Requirements of bidders concerning exports;
2. Suspension and debarment of timber purchasers;
3. Definitions necessary to fully implement the Act;
4. Prohibition against export of unprocessed Federal timber;
5. Prohibitions against the transfer of unprocessed private timber for export by a person who also holds or acquires unprocessed Federal timber, and prohibitions against export of unprocessed private timber that requires domestic processing;
6. Sourcing area application procedures;
7. Incorporation of sourcing area disapproval and review procedures;
8. Incorporation of procedures for a non-manufacturer to apply for a waiver of the prohibition against substitution in the preceding 24 months if the person certified by November 20, 1990 that he/she would cease exporting by February 20, 1991;

9. Procedures for reporting the acquisition and disposition of Federal timber and procedures for documenting transfers of unprocessed Federal and private timber requiring domestic processing;

10. Procedures for identifying unprocessed timber requiring domestic processing;

11. Civil and criminal penalties for violations of the Act or regulations issued under the Act, and procedures for assessment of civil and criminal penalties for violations of the Act or regulations issued under the Act;

12. Administrative remedies for violations of the Act or its implementing regulations, or contracts issued under the Act;

13. Authority for Regional Foresters to enter into cooperative agreements with other agencies;

14. Continuation of surplus species determinations pending a separate rule making; and

15. Incorporation of the rule regarding the indirect substitution exception in Washington State.

#### Summary of Comments and Responses

The Forest Service requested comments on the interim rule published November 20, 1990. The comment period for the interim rule closed December 20, 1990. Subsequently, as previously noted, the Forest Service published a proposed comprehensive rule to implement the remaining provisions of Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) in the **Federal Register** on January 29, 1991 (56 FR 3354). The comment period on the proposed rule closed March 15, 1991. The comments received on the interim rule have been considered along with those received on the proposed rule.

Comments were received from 89 respondents who made numerous comments relating to 17 separate subjects. All relevant comments have been given full consideration in adoption of this final rule. Comments were received from 66 timber sale purchasers; 12 timber industry associations; three timber trade organizations; two environmental organizations; two law firms; one private citizen; one forestry and marketing consultant; one port district; and one Federal agency, the U.S. Department of the Interior, Bureau of Land Management. With the exception of Bureau of Land Management, all respondents were from the western United States or from associations and entities representing western interests.

#### General Comments

Most respondents expressed general support for the Act and agreed that aggressive enforcement of the export restrictions on unprocessed Federal timber was necessary. However, most respondents also strongly opposed, as being excessively costly and unnecessarily burdensome, the

proposed procedures for reporting and record keeping and for identifying and marking unprocessed Federal and private timber. Many of these respondents offered constructive suggestions to reduce these costs and burdens. In addition, approximately half of the comments received from all respondents requested or suggested clarifications of proposed procedures and definitions of terms used in various sections of the proposed rule.

The proposed rule also requested nominations of surplus species, and specifically requested comments on the current determinations that Alaska Yellow Cedar and Port Orford Cedar are surplus to domestic manufacturing needs. Several respondents expressed opposition to continuing the determination that these species are surplus. Two respondents requested that Pacific Yew be considered surplus, and one requested that Western/Rocky Mountain Juniper be considered surplus. A separate proposed rule making will address surplus species.

Other respondents expressed strong opposition to the exporting of unprocessed timber from any source—Federal, other public and private lands—and to all forms of substitution of Federal and other public timber for exported private timber.

#### Comments by Section of the Proposed Rule

The following is a section-by-section summary of comments and the Department's responses to these in the final rule.

#### Amendment of Title 36, Part 223, Subpart B

This subpart provides the policies and procedures for planning, preparing, appraising, advertising, bidding, awarding and administering timber sale contracts. No comments were received specifically addressing these topics, however upon review of comments addressing the reporting requirements in the proposed rule, it became apparent that the requirements of prospective bidders for reporting prior export activities in the existing rule at § 223.87 were made obsolete by the passage of the new Act and the publication of this final rule. These reporting requirements have been removed in this final rule. This rule substitutes new reporting requirements that are consistent with the Act for contracts issued on or after August 20, 1990.

#### Section 223.87 Requirements of Bidders Concerning Exports

Section 223.87 in the existing rule required bidders to submit with their

bid for National Forest timber, as a condition of bid acceptance, a certification and report listing the disposition of all National Forest timber harvested in the previous calendar year; the amount of timber harvested by the bidder from private lands within the bidder's tributary area that was exported or sold for export during the previous calendar year; the locations of manufacturing facilities where the unprocessed timber was expected to be delivered; and the bases of historic purchase and export quotas. Further, § 223.87 required the bidder to notify the Forest Service of changes in destination of unprocessed timber after award of the contract. This report and certification were done on Forest Service form number FS-2400-43 (OMB No. 0596-0021) to be submitted with the completed bid form. If the FS-2400-43 form was not included with the bid or was not properly completed and signed, the bid could be declared nonresponsive.

Section 223.87 of this final rule would eliminate this certification and reporting requirement and the use of form FS-2400-43. Section 223.87 requires, for a bid to be considered responsive, a certification that (1) the bidder is eligible to acquire unprocessed timber originating from National Forest System lands west of the 100th meridian in the contiguous 48 States, in accordance with the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) and its implementing regulations, and (2) the bidder is in compliance with the provisions of the Forest Resources Conservation and Shortage Relief Act of 1990 and its implementing regulations. The reporting requirements in the current bid form are required in the transfer documents and annual report provisions in this rule, so there is no need to collect the information in the bid form. The certification statement is presently part of Forest Service bid form No. FS-2400-14 (1/94). The Office of Management and Budget approved the use of a bid form containing the certification statement regarding compliance through February 28, 1997, and assigned it Control Number 0596-0066. The current bid form was recently revised to add the sentence about eligibility to purchase National Forest System timber consistent with the Act and the regulations. If the bidder is an exporter of unprocessed timber originating west of the 100th meridian in the contiguous 48 States, eligibility includes having an exemption from the prohibition against substitution that would allow the acquisition of

unprocessed Federal timber, pursuant to the Forest Resource Conservation and Shortage Relief Act of 1990 and its implementing regulations.

#### **Amendment of Title 36, Part 223, Subpart C**

This subpart provides policies and procedures governing suspension and debarment of purchasers of National Forest System timber. It provides for listing of debarred and suspended purchasers and sets forth the causes and procedures for debarment and suspension and for determining the scope, duration, and treatment to be accorded to purchasers listed as debarred or suspended. No comments were received on proposed §§ 223.130, 223.131, 223.133, 223.135, 223.137, and 223.139. Except for minor changes to the text to improve technical and editorial clarity, the Department adopts these sections as proposed.

#### *Section 223.136 Debarment*

Section 223.136(b) of the current regulations establishes the effect of a proposed debarment on purchasers of Forest Service timber sale contracts. The current regulations state that, upon issuance of a notice of proposed debarment and until the final debarment decision is rendered, the person proposed for debarment shall not be allowed to bid on or receive new contracts or be granted contract term extensions.

The proposed rule specified that, upon issuance of a notice of proposed debarment, persons violating the Act or any contract or regulation issued under the Act, would not be allowed to enter into any contract to purchase unprocessed timber originating from Federal lands and would not be allowed to take delivery of unprocessed Federal timber from another party who purchased such timber until the debarment proceedings were completed.

*Comment.* Five respondents stated that it would be unfair if debarment were implemented without prior hearings or opportunity to comment. These respondents were concerned that the affected parties would not have the opportunity to respond to the causes upon which the proposed debarment action was based. Several respondents suggested that such a deprivation would be a violation of the due process clause of the Constitution.

*Response.* This proposed addition, which prohibits a person proposed for debarment from acquiring timber originating from Federal lands would not alter the procedures for debarment set forth in § 223.138, which establishes the process that Debarment Officers and

affected individuals must follow when debarment is being considered. Thus, affected parties would continue to have the opportunity to present information and arguments in opposition to, or in mitigation of the proposed debarment prior to the final debarment determination.

The standard of evidence for debarment (§ 223.138(b)(6)) is a preponderance of the evidence. This standard is deemed met where the cause for debarment is conviction or civil judgment. Where the evidence is sufficient to issue a notice of proposed debarment, good cause exists to protect Government and public interests by not initiating or extending further business dealings with that purchaser.

Further, the process prescribed in the rules provides the due process required by the Constitution. This process is consistent with Government-wide policies and procedures and has been upheld upon judicial review. A trial-type hearing is not required prior to a final debarment decision, unless a dispute of a material fact is raised. Further, the effects of a proposed debarment are limited by the prescribed time for issuance of a final debarment decision. Accordingly, the Department is adopting the revision to § 223.136 as proposed.

*Comment.* Several respondents suggested that any limitation of rights on a purchaser's existing contracts be deferred until completion of debarment proceedings.

*Response.* The effect of a proposed debarment is that a purchaser is precluded from consideration of bids on future timber sale contracts, award of future contracts, approval of third party agreements, or extensions of existing contracts, except pursuant to the terms of a contract term adjustment. A purchaser proposed for debarment pursuant to § 223.137(g) is precluded from entering into any contract to purchase unprocessed timber from Federal lands and is also precluded from taking delivery of Federal timber purchased by another person.

The rules do not limit a purchaser's rights on any existing contracts, except with respect to contract extensions. The Forest Service is not obligated to grant contract extensions. There may be situations when refusal to extend the duration of an existing timber sale contract is necessary to protect the Government's interest. If such protective action is not needed, the rule provides that the Chief of the Forest Service or authorized representative may determine that there is a compelling reason to extend an existing contract's term. Therefore, the final rule retains

the provision relating to extending the duration of an existing timber sale contract.

*Comment.* One respondent suggested that purchasers are subject to substantial penalties once a notice of debarment is issued. This respondent asserted that presumptions of guilt or wrongdoing are made prior to an adjudication of a person's rights and that such a system constitutes de facto debarment, is punitive and is impermissible.

*Response.* The Department realizes that debarment is a serious action. Debarment is, however, a separate administrative action that is not to be confused with criminal, civil or other administrative proceedings that may have punitive effects. Debarment is taken only to protect the Government's and the public's interests and, as a matter of law, is not taken with the intent to punish. Debarment actions are taken only as a means of ensuring that the Government only does business with responsible persons.

The effects of a proposed debarment, by virtue of the process that has been put into place, are not punitive. Once causes for debarment have been established sufficient to issue a notice of proposed debarment, the Government is justified in not conducting further business dealings with a person proposed for debarment, except on existing contracts. The Department also is authorized under the Act to preclude any person who violates the Act, or any regulation or contract issued under the Act from taking delivery of Federal timber purchased by another party.

The due process required by the Constitution is contained in the debarment procedures and is sufficient to avoid penalizing persons proposed for debarment. The procedures contained in the rule provide firm deadlines for the debarring official's final debarment determination. The procedures also allow an opportunity to respond to the proposed debarment, an opportunity for a fact-finding hearing when a dispute over a material fact is raised, and the procedures allow for reconsideration of the debarring official's final debarment determination, as well as appeal to the U.S. Department of Agriculture Board of Contract Appeals (36 CFR 223.138). The effect of a proposed debarment is not punitive. Therefore, except for minor changes to the text to improve technical and editorial clarity, the Department adopts this section as proposed.

*Comment.* One respondent suggested that the effect of a proposed debarment is the same as debarment and therefore, a purchaser is automatically debarred

based on the notice of proposed debarment.

*Response.* As stated previously, a notice of proposed debarment has the effect of excluding persons from further business dealings pending a final debarment decision. Again, where evidence is sufficient to issue a notice of proposed debarment, good cause exists to protect the Government and public interests by not initiating or extending further business dealings during the period of proposed debarment.

Further, the rules allow persons to submit, either in person or in writing, or through a representative, information and argument in opposition to the proposed debarment. Such persons also may submit evidence of mitigating factors and arguments concerning the imposition, scope, duration or effects of a proposed debarment or debarment. Based on such information, the debarring official may determine that causes for debarment do not exist, that only certain persons or divisions of an organization or company should be debarred, or that a period of less than the maximum allowed may be appropriate. If the information and arguments in opposition, or the mitigating factors are not persuasive, the period of debarment may be effective retroactively from the date of the notice of proposed debarment, that is, a person would not necessarily be proposed for debarment for a period of time and then have an additional three (3) to five (5) year debarment period added on to the time that has already passed during the period of the proposed debarment; any period of debarment may encompass the period of proposed debarment.

*Comment.* One respondent asserted that some companies or organizations may have separate divisions in various locations and that debarment may not be appropriate for all divisions of a company or its affiliates.

*Response.* There may be some situations where debarment of all organizational elements of a company or its affiliates would be inappropriate. The rules provide that persons may provide evidence of mitigating factors demonstrating that certain organizational elements or affiliates should not be debarred. However, unless specifically limited, debarment applies to all divisions or organizational elements of a purchaser and any affiliate who is specifically named, given written notice and an opportunity to respond. The rule allows an affiliate to challenge the basis for its debarment, not just its status as an affiliate. See § 223.138(b)(1).

*Comment.* One individual suggested the Forest Service should help parties

understand the intent and explain unclear aspects of the rule and stated that the Bureau of Land Management has always been willing to help parties to understand the rules and advise whether a proposed sale complies with its rules.

*Response.* The Department agrees that the Forest Service should help parties understand the Act and implementing rules; however, the Forest Service cannot give legal advice to timber purchasers. For legal interpretation of the Act or implementing regulations as they pertain to private business proposals, purchasers are advised to seek private counsel.

#### **Amendment of Title 36, Part 223, Subpart D**

Subpart D of part 223 governs timber export and substitution restrictions applicable to Federal timber purchases made before the Act. Enactment of the statute and adoption of interim regulations necessitated the addition of a new § 223.159 to existing subpart D in the interim rule to make clear that the provisions of subpart D remained in effect for contracts awarded before August 20, 1990. Section 223.159 of this final rule clarifies that § 223.162 remains in effect for all contracts awarded on or after August 20, 1990 until September 8, 1995. Section 223.159 of this final rule clarifies that certain rules in subpart F of part 223, which implemented the timber export and substitution restrictions of the Act in the interim rule, apply immediately to all contracts awarded on or after August 20, 1990. Minor technical and editorial changes to § 223.159 have been made to improve clarity. This final rule removes § 223.161, *Limitations on timber harvested in Alaska*, and § 223.163, *Determination that unprocessed timber is surplus to domestic needs*. The subjects covered in these sections are now covered in §§ 223.200 and 223.201 in subpart F.

Several respondents advised that the rule needs to clarify definitions and prohibitions in subpart D. However, since the terms are relevant to the new comprehensive rule, rather than those in effect at the time the new Act passed, the definitions identified by the public through submitted comments are addressed in § 223.186.

#### **Amendment of Title 36, Part 223, Subpart F**

The rules in Subpart F implement provisions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) that became effective upon enactment or as otherwise specified in the Act, and

incorporate and supplement the interim rules of this Subpart that were published in the **Federal Register** on November 20, 1990 (55 FR 48572). Except as otherwise provided in the Act, this Subpart will govern timber export and substitution restrictions applicable to Federal timber sale contract awarded on or after August 20, 1990.

#### *Section 223.185 Scope and Applicability*

*Comment.* One individual commented that the regulations do not adequately explain the differences between the old and new regulations. Another respondent was unclear as to which contracts the substitution provisions in this regulation apply.

*Response.* Section 497 of the Act (16 U.S.C. 620h) provides that nothing in this Act, or regulations issued under this Act, abrogates or affects any timber sale contract entered into before August 20, 1990.

Section 494 of the Act (16 U.S.C. 620 note) states that the provisions of the Act take effect on the date of enactment, except as otherwise provided. Section 490(a)(2)(A) of the Act (16 U.S.C. 620b) specifically provides that the substitution rules in effect before issuance of regulations to carry out the provisions of § 490(a) will continue to govern all contracts entered into between the purchaser and the Secretary of Agriculture before issuance of final rules. The prior rule concerned *direct* substitution only (36 CFR 223.162). Therefore, contracts awarded after enactment, but before the issuance of final rules continue to be governed by the rules concerning substitution in existence prior to enactment at § 223.162. As these contracts are completed, this regulation will no longer be effective, and will be removed or revised at that time. Contracts awarded on or after September 8, 1995 are governed in full by subpart F.

Section 490(b)(1) of the Act (16 U.S.C. 620b) states that, as of September 10, 1990, a person is prohibited from purchasing federal timber indirectly if that person would be prohibited from purchasing Federal timber directly. Contracts entered into before the date of publication of this final rule are governed by the substitution restrictions in effect before enactment of the Act. Federal timber purchased pursuant to a contract entered into before September 8, 1995 may be purchased indirectly only if the timber could be purchased directly under the prior rule.

Section 490(b)(2)(D) of the Act (16 U.S.C. 620b) delayed application of the indirect substitution restrictions in the State of Washington until rules were

issued to "carry out" the exemption from indirect substitution in Washington State. Therefore, the indirect substitution restrictions for National Forest System timber from Washington State are effective for contracts entered into between the purchaser and the Secretary of Agriculture as of publication of the rule of limited scope (56 FR 3375, December 19, 1991). This rule establishes the shares of exempted timber for specific persons.

The interim rule was the final rule for the provisions contained in that rule: Sourcing area applications, disapproval and review procedures, procedures for a non-manufacturer, certification procedures, continue surplus species determinations, and definitions applicable to the provisions of the interim rule (55 FR 48572, November 20, 1990). The interim rule has now been incorporated into this final rule, with changes as noted.

A final rule of limited scope was published on December 19, 1991 (56 FR 65834). This rule continued the reporting requirements applicable to contracts awarded before enactment, amended the rules for sourcing area disapproval and review procedures found in the interim rule and established procedures for persons applying for a share of the limited amount of unprocessed timber originally from National Forest System lands in Washington State that is exempt from the prohibition against indirect substitution. This rule has been incorporated into this final rule. Contracts entered into after enactment are governed by the provisions of the interim rule and the final rule of limited scope on the effective dates of those rules.

The Department has added a sentence regarding the application of subpart F to unprocessed private timber to clarify that unprocessed private timber that requires domestic processing is subject to subpart F. Further, the Department has added a sentence to clarify that the reporting requirements for transfers of unprocessed Federal timber applies on September 8, 1995, regardless of the contract award date. This ensures that enforcement of the Act can begin immediately. Since the transfer documents are not part of the substitution regulation, this requirement is not limited by the Act's provision that the prior substitution regulation applies to contracts entered into before issuance of this final rule. In addition, the Department has made minor technical and editorial changes to this section to improve clarity and describe the status of contracts awarded between

enactment of this Act and promulgation of final rules to maintain consistency throughout the rule.

#### *Section 223.186 Definitions*

The complexity of the Act requires definitions in order to explain and understand critical terms. Section 493 of the Act (16 U.S.C. 620e) defines several terms that require refinement. The following terms were defined in the interim rule, and were repeated with minor technical changes as needed, in the proposed rule for continuity, public understanding and comment: *Acquire, Act, Cants or Flitches, Export, Federal lands, Fiscal year, Non-manufacturer, Person, Private lands, Purchase, Substitution, and Unprocessed timber*. In addition, under the proposed rule definitions of the following additional terms were proposed: *Area of operations, Disregard, Each violation, Finished products, Gross value, Hammer brand, Highway yellow paint, Logs, Processed, Same geographic and economic area, Should have known, Transfer, Willful disregard, and Willfully*.

Nineteen responses were received concerning definitions. Ten responses addressed the definition of *Person*, focusing on the subcontractor. Other definitions addressed were: *Disregard, Each violation, Export, Finished products, Gross value, Processed, Same geographic and economic area, Transfer, Unprocessed timber and Willful*. Several respondents requested definitions for "manufacturing facility" and "sourcing area."

#### *Person*

*Comment.* Comments regarding the definition of "person" called for a more limited definition of "subcontractor," exclusion of independent contractors as subcontractors, and inclusion of subcontractors as only those persons controlled by the purchaser, or who meet the criteria of affiliates.

*Response.* The Act defines "person" as "any individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, or parent company, and business affiliates \* \* \*" 16 U.S.C. 620e(3) (emphasis added). If subcontractors were only to be considered in the context of affiliation, there would be no reason to include subcontractors in the definition of person.

The definition of subcontractor is "One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance."

*Black's Law Dictionary*

The extent to which a contractor and a subcontractor would be considered one "person" will depend on the specific facts of the arrangement between the contractor and subcontractor. The subcontractor obtains his status through his relationship with the contractor. If the subcontractor is acting independently, for instance, in violation of a provision in the Act or regulations, the subcontractor might be prosecuted as an "individual" or other corporate entity, not as a subcontractor.

*Comment.* One respondent expressed concern that a federal timber purchaser subcontracting with a contract logger who exports or who contracts to log timber that will be exported might be in violation of the Act under the definition of person. The same respondent was concerned that the contract logger who logs both federal logs and private logs eligible for export might be in violation of the Act under the definition of person.

*Response.* The response above outlines the purchaser's status. The status of the contract logger depends on the definition of "acquire". That is, if the contract logger is acquiring federal timber and exports private timber, then the contract logger would be in violation of the prohibition against substitution, assuming no exemption from the prohibition applied. The Act states that "acquire" means, "to come into possession of, whether directly or indirectly, through a sale, trade, exchange, or other transaction, \* \* \* 16 U.S.C. 620e(1). While the definition of acquire includes "possession", the definition seems to encompass only possession through different types of transactions that lead to control. The contract logger's ability to log federal timber and log exportable timber or export timber will depend on the specific circumstances by which each transaction is conducted.

After the end of the comment period for this rule, the Department received numerous letters regarding the definition of possession as used in the definition of acquire, and its effect on various business relationships, mainly service contracts. The Department may not consider these comments in this rule under the Administrative Procedure Act, 5 U.S.C. 553. However, the Department recognizes the need to clarify this issue, especially in light of the apparent change in the way business is conducted. Therefore, the Department is committed to issuing a proposed rule that will attempt to flesh out the definition of possession, and will ask for

comment on a sensible way to implement the intent of the Act to prohibit substitution while balancing enforcement of the Act with reasonable restrictions on business. The Department has deleted the last sentence regarding the standards in the Small Business Administration regulation at 13 CFR 121.401 that may serve as guidelines to determining affiliation for purposes of this Act. This deletion clarifies that the Small Business Administration regulation serves as a guideline only and does not govern these rules.

*Each Violation*

*Comment.* Several respondents expressed concern that the term "each violation" is too inclusive to meet the intent of the Act, and that, as defined in the rule, the violation counts would be compounded or multiplied. For example, each missing log brand and paint mark would be a separate violation in addition to the violation caused by the export of the log itself. These respondents suggested that multiple violations be treated as a single event.

*Response.* The Department believes that the rule's use of the term "each violation" is consistent with the intent of Congress, and that to reduce it would weaken the intent of the Act. Congress considered each violation of the Act serious and prescribed a penalty deemed appropriate to the infraction. Nothing in the Act suggests that "each violation" means a series of acts, or anything other than the plain meaning of the term. Further, section 492(c) of the Act (16 U.S.C. 620d(c)) provides the Secretary with discretion in assessing civil penalties. Therefore, this suggestion is not adopted.

*Comment.* One respondent commented in regard to "each violation," that human errors and mistakes are inevitable, and that, at times, safety conditions make complete compliance with the branding and painting requirement very difficult. This respondent felt that some reasonable standard must be used when enforcing this requirement.

*Response.* The Department agrees that occasional "human errors" are understandable. However, purchasers are expected to emphasize the importance of complying with the Act to their employees and subcontractors and to ensure that compliance is attained.

*Comment.* One individual said the rule should indicate that the Secretary would use discretion and judgment in determining penalties for specific violations of the Act.

*Response.* Congress gave the Secretary authority in section 492(c) of the Act (16 U.S.C. 620d(c)) to impose penalties for specific violations. These penalties include ceilings but do not mandate specific amounts. Therefore discretion will be used in the imposition of the penalties.

Having considered the various comments received, the Department adopts the definitions of "each violation" as presented in the proposed rule.

*Export*

*Comment.* One respondent stated that the definition of when export occurs provides a possible loophole in the prohibition against substitution.

*Response.* The Department agrees that the definition of when export occurs could provide a loophole to the substitution restrictions. Accordingly, the Department has revised the portion of the definition that relates to the date that an export agreement is entered into.

The definition in the proposed rule states that "(E) export occurs on the date that a person enters into an agreement to sell, trade, exchange, or otherwise convey such timber to a person for delivery to foreign country. If that date cannot be established, export occurs \* \* \*". This definition could permit a person to enter into long-term export agreements just before the issuance of this rule, or 24 months before acquiring Federal timber, and still be exporting, or causing to be exported, private timber while acquiring Federal timber. This activity could occur because the date of the export agreement preceded the effective date of this rule or the 24-month restriction against exporting prior to acquiring Federal timber. This kind of activity would constitute substitution.

To close this potential substitution loophole, the Department has revised the definition of when export occurs by dropping the phrase "If this date cannot be established" and simply listing three independent conditions which for the purposes of the Act, would establish when export occurs as follows: "Export occurs: (1) On the date that a person enters into an agreement to sell, trade, exchange or otherwise convey such timber to a person for delivery to a foreign country; (2) when unprocessed timber is placed in an export facility in preparation (sorting, bundling, container loading etc.) for shipment outside the United States; or (3) when unprocessed timber is placed on board an ocean-going vessel, rail car, or other conveyance destined for a foreign country."

*Comment.* Another respondent commented that the date on which export occurred must be established with certainty.

*Response.* The Department intends to ascertain as closely as possible when export occurs by thoroughly investigating all suspected or alleged export violations. The Department believes the definition of export, as revised in this final rule, meets the administrative and enforcement responsibilities required by the Act.

*Comments.* Several respondents stated that the definition of "export" fails to clarify which contracts fall within its definition.

*Response.* The purpose of a definition is to clarify and provide a consistent meaning of a term wherever it is used in the regulation. See § 223.185, Scope and Applicability, regarding which contracts are governed by this rule.

*Comment.* One respondent stated that the definition of export in the proposed rule needs clarification because by "transporting \* \* \* through another party", a person cannot prevent the other party from exporting the timber.

*Response.* If a person notifies the recipient of the timber of the need for domestic processing, pursuant to the rule's requirements at 36 CFR 223.193 and 223.194, the person would not be entering into an agreement to export, nor would the person be responsible for export that is conducted by a subsequent party.

#### *Finished Products, Processed and Unprocessed Timber*

*Comment.* Several respondents commented that the definitions of "finished products" and "unprocessed timber" are ambiguous. As an example, they point to § 223.187, where certain products which are not in finished product form are excluded from the definition of unprocessed timber.

*Response.* The Department believes that the term "finished products" is clear. The term is used in reference to "finished products" made of western red cedar that are exempt from the prohibition against indirect substitution (16 U.S.C. 620b(b)(1)). The term "finished products" in the Act suggests more than simply products processed to specific standards, since these products could be remanufactured; the term suggests that the products must be intended for end product use.

The Department agrees that clarification regarding "unprocessed timber" is necessary to prevent products produced within the sale area that could be either finished products or unprocessed timber, such as poles, posts, piling, pulpwood bolts, pulp logs

and cull logs, from being removed from the sale area or transferred without reporting or identification, and later exported as unprocessed timber. While the Act lists some of the products that may fall into this category in section 493(7)(B) (16 U.S.C. 620e(7)(B)), other products, such as house logs that are part of a structure kit may be indistinguishable from unprocessed timber. Accordingly, the definition of "unprocessed timber" has been expanded in the final rule to add "\* \* \* For the purposes of reporting and identifying under §§ 223.193, 223.194 and 223.195, unprocessed timber also means timber products listed in § 223.187 of these regulations, and other timber products, including house logs, that are indistinguishable from other unprocessed timber." The Department also added a statement to the definition that "unprocessed timber does not include products intended for remanufacture that meet the criteria listed in § 223.187(a) (2) or (3)." This clarifies that the Act defines certain products as not unprocessed, or processed, that are intended for remanufacture.

The Department has also concluded that the definition of the term "processed" should be revised to remove the reference to "not unprocessed" because this terminology is not used in the rule. Further, § 223.187(b) of these regulations must be included in the reference to § 223.187, since paragraph (b) states what is *not* unprocessed western red cedar. Therefore, the definition has been revised to read as follows: "*Processed* means timber processed into products listed in § 223.187 of these regulations."

*Comment.* In commenting on these definitions, two respondents expressed uncertainty as to whether each piece in an entire order must satisfy the lumber grade requirements specified in the Act for determining whether timber is processed to standards and specifications suitable for end product use.

*Response.* Congress specified in section 493(7)(B) (16 U.S.C. 620e(7)(B)) that products meeting the current standards of the American Lumber Standards Grades or Pacific Lumber Inspection Bureau's Export R or N list clear grades are not "unprocessed." The standards that the two bureaus use are defined in the *Export R List Grading and Dressing Rules* book, published by the Pacific Lumber Inspection Bureau (1971) and adopted by the West Coast Lumberman's Association and the British Columbia Lumber Manufacturers Association, which reads, "\* \* \* a variation not to exceed 10 percent, more

or less, of the quantity ordered shall be allowed in filling cargoes and/or parcel lots." (p. 4) Thus, there is no requirement that each piece in the entire order satisfy the grade requirements. However, in any given lot, at least 90 percent of the pieces must meet these grade requirements.

#### *Gross Value*

*Comment.* One respondent stated that gross value should not include the cost of ocean freight or insurance when sales are made on a "C&F" or "CIF" basis. The respondent stated that including these costs could cause customers to obtain these services abroad.

*Response.* The Act uses the term, "gross value" in the civil penalties section, where the Secretary may assess a \$500,000 penalty or "three times the gross value of the unprocessed timber involved" for a violation of the prohibition against exporting Federal timber. The proposed rule defined gross value as the total amount that the person received from the export purchaser for the unprocessed Federal timber involved in the violation, before production, delivery, agent fees, overhead, and other costs are removed. The marketplace decides the total amount received and the Department does not intend to look behind this figure at the specifics of the business agreement. The Department has clarified in this rule that the gross value is the value of the timber when it is transferred. Other than this change, no change in the rule has been made in response to this comment.

#### *Manufacturing Facility*

*Comment.* Several respondents suggested that a definition be included in the final rule defining the meaning of "manufacturing facility." One respondent stated that the term "non-manufacturer" needs clarification, because of the ambiguity of the term "manufacturing facility." This respondent suggested that non-manufacturer be defined as it is in the SBA program. Another respondent objected to the inability of non-manufacturers to obtain sourcing areas. It was also suggested that "manufacturing facility" be limited to a permanently located operation designed and used to convert logs into primary wood products, including lumber and veneer products, and that it should not include secondary wood processing plants, chip, or fiber operations.

*Response.* The Department agrees that the term "manufacturing facility" needs to be defined, and that a manufacturing facility should be defined in terms of its permanent location. The Act implies a



permanent location for manufacturing facilities, in section 490(c)(3) (16 U.S.C. 620b(c)(3)); the Act requires the sourcing area to be the area sourced by the applicant's "timber manufacturing facilities." The Act's intent to define a sourcing area by a permanent manufacturing facility is the reason that non-manufacturers may not apply for sourcing areas.

However, the Department disagrees that the definition should exclude producers of chips or fiber products. Sourcing areas are where the applicant desires to "process" timber (16 U.S.C. 620b(c)(3)). In 16 U.S.C. 620e(7)(B)(ix), the Act defines timber not included as unprocessed, that is, processed timber, to include pulp or logs *processed* for conversion into chips. Since this type of facility is specifically included as a processing facility, it is also included in the definition of "manufacturing facility."

Therefore, the Department has added the following to § 223.186: "*Manufacturing facility* means a permanently located processing plant, used to convert unprocessed timber into products." The Department believes this addresses the ambiguity in the term "non-manufacturer" without adopting SBA rules.

#### *Same Geographic and Economic Area*

*Comment.* One respondent stated that there is no reference to "same geographic and economic area" with regard to sourcing areas, as the proposed definition seems to indicate.

*Response.* While there is no specific reference to "same geographic and economic area" in the sourcing area provision of the Act, this concept is used in determining sourcing areas; the term reflects the Act's requirement that sourcing areas be "geographically and economically separate" from areas where a person harvests private timber for exporting. An area that is geographically and economically separate from an exporting area cannot also be the same geographic and economic area from which a person exports. No change is needed in the rule.

*Comment.* Several respondents called for a revised definition of "same geographic and economic area." The respondents felt that the definition is too broad and suggested narrowing the definition to meet the Act's intent regarding substitution. Another respondent stated that the Act has a provision that prohibits the purchase of unprocessed federal timber and the export of unprocessed private timber within the past 24 months (16 U.S.C. 620b(a)(1)(B)). The respondent said this

provision addresses the concern in the proposed rule that if substitution generally were defined pursuant to the sourcing area concept of geographically and economically separate areas, persons would be granted *de facto* sourcing areas. This commenter also said that the two different definitions of "same economic and geographic area" hinge on a definition of "private lands" as west of the 100th meridian in the contiguous 48 states, and that the Act does not so limit the definition of private lands.

*Response.* The Department agrees with the last commenter that the Act provides a prohibition that addresses the concern about *de facto* sourcing areas, and that, accordingly, as the other respondents suggested, there is no need to have the second, broader definition of "same economic and geographic area." The Act states, in the section concerning direct substitution, that, "except as provided in subsection (c) of this section (sourcing area approval process)," a person may not purchase unprocessed federal timber originating from west of the 100th meridian in the contiguous 48 States if, "(A) such unprocessed timber is to be used in substitution for exported unprocessed timber originating from private lands; or (B) such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands." 16 U.S.C. 620b(a)(1) (emphasis added).

The prohibition in subsection (A) is further defined in the Act. Section 620(e)(8) states that, "[t]he acquisition of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States to be used in 'substitution' for exported unprocessed timber originating from private lands means acquiring unprocessed timber from such Federal lands and engaging in exporting, or selling for export, unprocessed timber originating from private lands within the same geographic and economic area." (emphasis added) The underlined portion of the definition is virtually identical to the prohibition in section 620b(1)(A). The prohibition in subsection (B) is much broader, and, by its own terms, prohibits the purchase of federal timber and the export of private timber in the past 24 months, without reference to the same geographic and economic area.

The Act provides that an approved sourcing area is an exemption from the prohibitions in subsection (a) of 16 U.S.C. 620b, in addition to those prohibitions as they relate to indirect substitution in subsection (b). The section concerning sourcing areas states

that, "[t]he prohibitions contained in subsections (a) and (b) of this section shall not apply with respect to the acquisition of unprocessed timber originating from Federal lands within a sourcing area west of the 100th meridian in the contiguous 48 states approved by the Secretary \* \* \* 16 U.S.C. 620b (emphasis added). In terms of the prohibition in section 620b(a)(1)(A), an approved sourcing area is the only structure provided by the Act to show that purchasing unprocessed federal timber and exporting unprocessed private timber is not occurring within the same economic and geographic area. (For example, a person who had not exported within the past 24 months, but began exporting after purchase of the unprocessed federal timber, would need a sourcing area within which to purchase the federal timber in order to demonstrate that the export and federal purchase areas were geographically and economically separate.) In terms of the prohibition in section 620b(a)(1)(B), a sourcing area is required if a person who had exported within the past 24 months in the west wanted to purchase unprocessed federal timber. Because of the specific statutory provision prohibiting the purchase of unprocessed federal timber and the export of private timber without limitation to the "same geographic and economic area," the Department agrees that there is no need for the second, broader definition of that term, and has deleted that definition from the rule.

The Department does not agree that the term "private lands" should not be limited to west of the 100th meridian in the contiguous 48 states. While the Act does not specifically define "private lands" as being west of the 100th meridian in the contiguous 48 States, the Act must be implemented in a manner that gives meaning to all of the provisions of the Act. The Act concerns transactions west of the 100th meridian in the contiguous 48 States. To interpret private lands without such a limitation would mean that export in the previous 24 months from anywhere in the United States (and possibly even export from private lands in a foreign country) would disqualify a person from purchasing unprocessed federal timber, pursuant to 16 U.S.C. 620b(a)(1)(B). There is nothing in the Act to suggest such a broad prohibition. No change in the rule is necessary in response to this comment.

#### *Sourcing Area*

*Comment.* Several respondents suggested that a definition of "sourcing area" be included in the rules.



*Response.* The Department concurs that a definition of "sourcing area" is desirable. The definition includes the requirement that the sourcing area be economically and geographically separate from any geographic area from which the persons harvests private timber for export, pursuant to the requirement in the Act. 16 U.S.C. 620b(c)(3). Further, the interim rule required sourcing area applicants to include in the map of the sourcing area boundary both Federal and private lands that source the mill that was the subject of the initial applications. The Department has adopted this requirement in the definition of sourcing area. The Act requires the Secretary to consider the "timber purchasing patterns, on private and Federal lands" in the determination of the sourcing area boundary (16 U.S.C. 620b(c)(3)). If private lands were not included in the sourcing area boundary, the Secretary could not establish that the sourcing area is geographically and economically separate from the area where the sourcing area holder or applicant harvests private timber for export as required by the Act. Otherwise, private lands sourcing the mill could be the same lands from which the sourcing area holder or applicant harvests timber for export. The definition of sourcing area is as follows: "*Sourcing area* means the geographic area approved by the Secretary which includes a person's timber manufacturing facility and the private and Federal lands from which the person acquires or intends to acquire unprocessed timber to supply such facility; a sourcing area must be geographically and economically separate from any geographic area from which that person harvests for export any unprocessed timber originating from private lands."

#### *Substitution*

The proposed rule included the definition of substitution found in section 493(8) of the Act (16 U.S.C. 620e(8)). However, analysis of the comments and preparation of the final rule, specifically, the comments on the definition of "same geographic and economic area" discussed in the preamble, revealed that this definition applies only to one of the substitution prohibitions in the Act. Under the section entitled, "Limitations on the substitution of unprocessed Federal timber for unprocessed timber exported from private lands (a) Direct substitution" the Act lists two prohibitions. The section states that, except as provided in subsection (c), the sourcing area approval process, no

person may purchase directly from the United States unprocessed timber originating from federal lands west of the 100th meridian in the contiguous 48 States if, "(A) such unprocessed timber is to be used in substitution for exported unprocessed timber originating from private lands; or (B) such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands."

16 U.S.C. 620e(8) further defines the prohibition in § 620b(1)(A). The definition does not state, "Substitution means \* \* \*," but rather, uses a phrase virtually identical to the prohibition in section 620b(1)(A), and states what that phrase means: "*The acquisition of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States to be used in 'substitution' for exported unprocessed timber originating from private lands* means acquiring unprocessed timber from such Federal lands and engaging in exporting, or selling for export, unprocessed timber originating from private lands within the same geographic and economic area." (Emphasis added)

A need to modify the definition of substitution to fully reflect all of the substitution prohibitions in 16 U.S.C. 620b was recognized. Therefore, the definition of substitution has been modified as follows.

First, the definition of substitution has been modified to include both prohibitions found in section 620b(a), as further defined in section 620e(8). That is, a person violates the prohibition against substitution if such person acquires, directly or indirectly, unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States and engages in exporting or selling for export, unprocessed timber originating from private lands within the same geographic and economic area, pursuant to section 620b(a)(1) (A), as further clarified in section 620e(8), or such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands, pursuant to section 620b(a)(1)(B).

Second, the definition of substitution has been modified to close a loophole, in order to heed the Act's intent regarding the substitution prohibitions. The proposed rule's list of prohibitions did not limit when the purchase of unprocessed Federal timber could occur if there is subsequent exporting, unlike the 24-month limit on exporting that precedes the purchase of unprocessed Federal timber. The prohibitions did not prevent unprocessed Federal timber purchased before the export of

unprocessed private timber from being substituted for the unprocessed private timber. To comply with the Act's prohibitions, a person will be committing a violation if the person engages in export, or selling for export, unprocessed timber originating from private lands during any calendar year within the same geographic and economic area that a person has unprocessed Federal timber in the person's possession or under contract. Calendar year has been adopted as the appropriate time period because it provides a consistent time period and is familiar to many purchasers who have operated under the prior substitution regulations.

Third, for clarity, the definition of substitution has been modified to include one of the prohibitions against substitution included in the proposed rule in § 233.189. Substitution occurs when a person purchases unprocessed Federal timber and sells unprocessed private timber that requires domestic processing to a third party if the third party or successive parties export the private timber. The third party or successive parties may not export such timber. The prohibition has been modified to clarify that the private timber that may be subject to a substitution violation is that timber that requires domestic processing. In this way, the private timber that may be subject to a substitution violation is identified.

In summary, the modified definition of substitution is as follows: "*Substitution*" occurs when: (1) A person acquires, directly or indirectly, unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States and engages in exporting or selling for export, unprocessed timber originating from private lands within the same geographic and economic area; or (2) a person acquires, directly or indirectly, unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States and, during the preceding 24-month period, exported unprocessed timber originating from private lands; or (3) a person exports or sells for export, unprocessed timber originating from private lands within the same geographic and economic area in the same calendar year that the person has unprocessed timber originating from Federal lands in the person's possession or under contract; or (4) a person purchases, directly or indirectly, unprocessed timber originating from Federal lands if such person sells or otherwise transfers unprocessed timber that originates from private lands west of the 100th meridian

in the contiguous 48 States and that requires domestic processing, to a third party if that third party or successive parties export that unprocessed private timber. A third party or successive parties who acquire such unprocessed timber that originates from private lands west of the 100th meridian in the contiguous 48 States and that requires domestic processing may not export such timber.

#### Transfer

*Comment.* One respondent was unsure whether "transfer" was limited to transfer of ownership.

*Response.* The definition of "transfer" means to pass title "or otherwise convey"; it is not limited to the transfer of ownership. No change in the definition is necessary.

#### Willfully, Willful Disregard, and Disregard

*Comment.* Several respondents criticized the definitions of *willful* and *willfully disregard* for not including the requirement that the person intended to violate the Act or its implementing regulations. One respondent stated that, while the rule defines the terms as requiring the general intent of intentionally violating an act that is prohibited, the Act requires that these terms include the specific intent of violating the Act.

*Response.* The Department does not agree with these comments. Defining "willfully" or "willful disregard" as a specific intent to violate a statute or regulations is a standard used in criminal law. The definition of "willfully" or "willful disregard" in the context of civil penalties is a less stringent standard. See, e.g., *Brock v. Morello Brothers Construction, Inc.*, 809 F.2d 161, 164 (1st Cir. 1987). However, the Department is modifying the definitions of "willfully" and "willful disregard" to follow more closely the Supreme Court's decision in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). In that case, the statute of limitations for a willful violation of the Fair Labor Standards Act (FLSA) extended the statute of limitations from two to three years. The Court stated that a party had committed a willful violation if the party knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *McLaughlin*, 486 U.S. at 133, citing *Transworld Airlines, Inc. v. Thurston, et al.*, 469 U.S. 111 (1984). The party need not know that the conduct is unlawful, but must at least show indifference to the rules. *Brock*, 809 F.2d at 164, citing *Thurston*. The Supreme Court in *McLaughlin* favored

this stricter standard over a less stringent standard followed in some of the case law, given the distinction in the FLSA between the statute of limitations for "ordinary" violations and that for willful violations. *McLaughlin*, 486 U.S. at 132.

Likewise, in the Act, there is an appreciable difference in the amount of penalty that may be assessed for a willful violation, or a violation committed with willful disregard (\$500,000), and violations committed either in disregard or by a person who "should have known" (\$75,000 and \$50,000, respectively). Therefore, the Department has changed the definition of willfully and willful disregard to mean committing an action that a person knew or showed reckless disregard for the matter of whether the person's conduct was a violation of the Act (or its implementing regulations, in the case of "willfully").

*Comment.* One respondent stated that the definition of disregard is too broad, and should also include specific intent.

*Response.* The rule's definition of disregard is taken from *Black's Law Dictionary*, 5th Ed.: "to ignore, overlook, or fail to observe" any provision of the Act. Intent is not a prerequisite to committing a violation "in disregard" of the Act or its implementing regulations. Such a definition would render the definition of willfully and willful disregard meaningless. No change has been made in the rules in response to this comment.

The standards of "disregard" and "should have known" are similar to the degrees of negligence. That is, they differ in the "degree of inattention" with which the actor commits an act. "Disregard", is more than "simple inadvertence." The Department believes that the civil penalties may be understood more clearly if they are presented together. Therefore, the Department has placed all of the standards for civil penalties under the heading, "Civil penalties."

In addition to the aforementioned changes, the Department has made minor technical and editorial changes to other definitions within this section to improve clarity; these changes have no substantive effect.

#### Section 223.187 Determination of Unprocessed Timber

The definition of unprocessed timber in the Act refers to minimum standards and grades of lumber. In order to determine that these standards have been met, the Department proposed in § 223.187 that the shipper of record possess a legible copy of a lumber inspection certificate issued by a lumber

inspection/grading organization generally recognized by the industry as setting a selling standard. This certificate would be in the shipper's possession for each shipment and be available for inspection upon request of the Forest Service.

*Comment.* Several persons objected to the requirement that products be "manufactured for a specific order," stating that commonly ordered products generally are produced without specific orders and stored in inventory. This practice ensures that production need not be curtailed during slow periods and that companies can respond quickly to subsequent orders for products.

*Response.* The Department concurs with these respondents that § 223.187(a)(1)(ii) needed revision for clarity. It is important for enforcement of the Act, not that products in a shipment have been manufactured for a specific order, but that the products are only intended to be used in the form shipped, and not to be remanufactured into other products in the foreign country. Therefore, in response to this comment, § 223.187(a)(1)(ii) in the final rule has been revised to require that the shipper of record have available for Forest Service inspection a certificate certifying to the intended use of the shipment or order. Likewise, a certification requirement has been added for pulpwood bolts, pursuant to § 223.187(a)(8), to insure that the intent of processing the bolts into pulp is met. These certifications are not required if the timber obtained may be exported (for instance, because the timber originates from private lands from which the timber may be exported) without regard to intended use of the shipment or order. This has been clarified in § 223.187(a)(1).

For ease of administration, the specific certification language has been provided in § 223.187(b) (2) and (3). The person signing the certificate certifies the shipping order number, the date of that order and the intent that the material will be used as shipped or processed into pulp and will not be manufactured into other products. The certifier also certifies that the certification is made with full knowledge of the Act and its implementing regulations. Further, the certifier certifies that exporting unprocessed timber originating from Federal lands or exporting unprocessed timber from private lands that is required to be processed domestically is a violation of the Act and its implementing regulations, and that signing the certificate without abiding by its contents is a violation of the False Statements Act. Regarding a

corporation, only a person authorized in writing by the Chief Executive Officer to sign certificates pursuant to 36 CFR 223.187(a)(1)(ii) may sign such certificates. The Forest Service must receive the original, written authorization from the Chief Executive Officer, pursuant to 36 CFR 223.187(b)(5), before a person is authorized to sign the certificates.

*Comment.* Three respondents suggested that instead of requiring that the shipper of record have in its possession a certificate issued by a lumber inspection/grading bureau, the provisions of the Act related to processed products could be met simply by either requiring the shipper of record to have the certificate available for inspection, or declaring that the products in a particular shipment were inspected, graded, and found to meet the requirements of processed products under the Act, or requiring the shipper of record to certify that "The material in this shipment is conveyed pursuant to the attached order and is not intended for remanufacture."

*Response.* The Department is requiring that the shipper of record have the certificate issued by the lumber inspection/grading bureau in his/her possession, available for inspection, i.e., readily available, not that the shipper of record necessarily have the certificate on his/her person. Regarding the declaration and the certificate, the Department agrees that these are necessary to ensure that the shipper of record understands that the shipment is not intended for remanufacture. The proposed rule required such a certificate in § 223.187(a)(1)(ii). In order to clarify this requirement, the final rule has amended this section to include the specific certification language that should be used. This certification does not substitute for the lumber inspection certificate. This certificate assures the Department, by the persons responsible for lumber inspection and grading, that the lumber meets the grading requirements of the Act at 16 U.S.C. 620e(7)(B).

*Comment.* One person stated that requiring separate (lumber grade) inspections of each shipment would deter processed product exports, contrary to the intention of Congress. The respondent also stated that products scheduled for one shipment that are delayed or diverted to another should not require a second certificate.

*Response.* The Department disagrees with this comment. Certified lumber inspection certificates are a common component of shipment documentation and, therefore, pose no deterrence to lumber exports. The Department accepts

the certificate for compliance and enforcement purposes in lieu of breaking apart bundles of lumber prepared for export and individually grading each lumber piece, which certainly would deter exports.

Further, a lumber inspection certificate is required for each shipment or order, regardless of how the material in the shipment came to that shipment. This requirement is necessary for effective inspection of various shipments.

*Comment.* Several respondents stated that § 223.187 should make clear that restrictions and documentation apply only to material to be exported, not to products sold for domestic consumption, regardless of the degree of manufacture.

*Response.* The Department agrees with this comment. The Act does not place restrictions on products intended to be sold or manufactured domestically. The Department believes that the rule clearly states that the requirements in § 223.187 apply to material to be exported. Therefore no revisions are necessary in response to this comment. It should be noted, however, that the definition of unprocessed timber includes the items listed in § 223.187 that are indistinguishable from unprocessed timber for purposes of the record keeping and marking requirements in §§ 223.193–195.

*Comment.* Several respondents expressed concern that lumber that does not meet the clear grade standard will cause them significant practical problems, particularly for products up to 12 inches thick which were manufactured as exportable clear grades but, upon inspection, failed to meet the standard. These respondents felt the rule would force them to remanufacture such lumber into exportable products up to 8¾ inches thick, or into other products.

*Response.* Congress included in the Act language permitting the export of clear grade timbers (cants or flitches) up to 12 inches thick and cants of a lesser grade up to 8¾ inches thick intended for remanufacture. Export R List Grading and Dressing Rules permit up to 10 percent of the pieces in a given lot to be outside the specified lumber grade for the lot. Therefore a lot of clear grade 12 inch cants may contain individual cants that do not meet this grade and still qualify for export, provided the lesser grade cants do not make up more than 10 percent of the total lot. If a given lot of 12 inch cants is outside this accepted grading tolerance level, the exporter will have to remove the below grade cants from the lot and re-saw

them to not more than 8¾ inches in thickness before exporting or be in violation of the Act. Accordingly, no change in the rule as proposed is necessary.

*Comment.* Several respondents stated that the final regulations should allow export of clear lumber meeting the referenced grades in thicknesses up to and including 12 inches nominal. These respondents stated that a nominal 12 inches would permit cants cut from fresh cut green trees to be sawn slightly thicker than a true 12 inches to allow for shrinkage back to 12 inches as the wood dries.

*Response.* The Department declines to adopt this comment. The Act states specifically the maximum thickness of a cant meeting clear grade specification permitted to be exported without further processing is 12 inches (16 U.S.C. 620e(7)(ii)).

*Comment.* One respondent commented that a producer should be permitted to seek export customers who can use mismanufactured products as is, without further manufacture.

*Response.* Section 493(7)(B) of the Act (16 U.S.C. 620e(7)(B)) states explicitly the lumber grades and maximum timber sizes that may be exported for further manufacturing outside the United States. In accordance with the Act, products needing further processing before use must meet these grades and size restrictions before being exported. No change in the final rule is made in response to this comment.

*Comment.* Two respondents stated that the rule also should expressly permit the chipping of any Federal log or portion of a Federal log at domestic operations and that any log which is used solely for domestic chipping be considered a pulp or cull log even if it meets technical specifications for some other grade. Another respondent suggested that a load of logs consisting mainly of chip logs with some higher-grade logs mixed in should be classified as chip logs, even if all or some of the higher-grade logs are processed into some other product. This would prevent waste and encourage the most efficient use of these Federal logs.

*Response.* The rule does not preclude the chipping of any log obtained from Federal lands. However, the Act at 16 U.S.C. 620e(7)(B)(ix), exempts only pulp and cull logs from the meaning of the term "unprocessed timber," with regard to logs that are processed at domestic pulp mills, domestic chip plants or other domestic operations for the purpose of conversion of the log into chips. Congress did not state that any log converted into chips is exempted from the restrictions on unprocessed

timber. Rather, Congress specifically excepted *pulp and cull logs* if they are processed into chips.

To assure that pulp and cull logs that may be indistinguishable from unprocessed timber are not subsequently exported, they must be identified, pursuant to the revised definition of unprocessed timber in 36 CFR 223.186 of this rule.

#### *Determination of Unprocessed Western Red Cedar*

Since publishing the proposed rule, the Bureau of Export Administration, Department of Commerce, published a proposed rule on June 3, 1991 (56 FR 25054), and a final rule on January 6, 1993 (58 FR 487), amending the Export Administration Regulation at 15 CFR 777.7, governing the export of unprocessed western red cedar. The Department of Commerce's final rule revises the definition of processed western red cedar to exclude any individual piece of western red cedar having a cross section that exceeds 2,000 square centimeters (310 square inches), regardless of grade. This change makes the United States' western red cedar export restrictions consistent with those of the Providence of British Columbia, Canada. Section 223.187(c) of this rule has been revised to conform with the change in the Department of Commerce's rule governing export of western red cedar.

*Comment.* One respondent mentioned the proposed rule published by the U.S. Department of Commerce and urged that the U.S. and Canadian Governments develop a standard definition for all species of unprocessed timber.

*Response.* Section 491(d)(5) of the Act (16 U.S.C. 620c(d)(5)), which imposes restrictions on exports of unprocessed timber originating from State or other public lands, states "nothing in this section shall be construed to supersede the provisions of section 7(i) of the Export Administration Act of 1979 (50 U.S.C. App. 2406(i))." In order to provide a consistent definition of western red cedar for Federal as well as State and other public lands, and to provide for consistent exporting procedures, § 223.187 of the proposed rule included the definition of western red cedar taken from the timber export regulations established by the Secretary of Commerce at 15 CFR 777.7, which implement section 7(i) of the Export Administration Act, as amended. Discussions on standard definitions of unprocessed timber for species other than western red cedar have not been undertaken as of this date. However, the Act specifically defines unprocessed timber in section 493(7)(A) and (B), and

is sufficient for the purposes of this rule making.

In order to monitor any indirect substitution violations, the Department has added a certificate to a new paragraph (d) similar to the certificate for § 223.187(b) with regard to the intent of the shipper of record. The certificate requires the shipper of record to identify whether the product is intended for end product use, and to acknowledge that only processed western red cedar that is intended for end product use is exempt from the prohibition against indirect substitution. Western red cedar products that are "processed" may be exported, but they are not excluded from the prohibition against indirect substitution unless they are intended for end product use. Without this certificate, the Department has no way of enforcing the exemption from indirect substitution allowed for "finished products" of western red cedar, because the Department could not determine by inspection whether a product is intended for end product use. The certificate reads as follows: "I certify that the products in the shipment identified by my shipping order number \_\_\_\_\_, dated \_\_\_\_\_, are manufactured in accordance with the attached order from \_\_\_\_\_ (buyer) \_\_\_\_\_ of \_\_\_\_\_ (address) \_\_\_\_\_, numbered \_\_\_\_\_ and dated \_\_\_\_\_, are / are not intended for end product use. I understand that only western red cedar products that are *finished products* are exempt from the prohibition against indirect substitution in the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620b(b)(1)) and its implementing regulations. I make this certification with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations. I fully acknowledge and understand that to require western red cedar under the indirect substitution exemption in section 490(b)(1) of the Act (16 U.S.C. 620b(b)(1)) for purposes other than domestic processing into finished products will be a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies for such violation." The signatory process and Chief Executive Officer authorization of the signatory is the same as for the certificate in § 223.187(b).

Otherwise, the Department has made several changes to the text as proposed for technical and editorial clarity, but such changes have no substantive effect.

#### *Section 223.188 Prohibitions Against Exporting Federal Timber*

This section of the proposed rule was identical to that in the interim rule. Section 489 of the Act (16 U.S.C. 620a) continues the prohibition against the export of timber from Federal lands west of the 100th meridian in the contiguous 48 States that has been renewed annually through the Appropriations Act for Interior and Related Agencies.

*Comment.* Only one comment was received on this section. The respondent stated that "Our company opposes export of logs regardless of origin."

*Response.* The Act does not prohibit exporting of logs from private lands as long as logs from Federal lands are not substituted for those exported private logs in the domestic market. The Department has no authority to restrict private log exporting allowed by the Act; therefore, this section of the final rule is unchanged.

#### *Section 223.189 Prohibitions Against Substitution*

This section of the proposed rule also was almost identical to that in the interim rule; the proposed rule added a paragraph (a)(3) to § 223.189. This section was repeated in the proposed rule to provide readers with a comprehensive review of the Act's implementing regulations and to provide for public comment on the interim rule. Several changes have been made to clarify this section.

Section 490 of the Act (16 U.S.C. 620b) limits direct and indirect substitution of unprocessed Federal timber for unprocessed timber exported from private lands. Section 490(a) of the Act (16 U.S.C. 620b) entitled "*Direct Substitution*" states that no person may purchase directly from any Department or agency of the United States unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States if:

(A) Such unprocessed timber is to be used in substitution for exported unprocessed timber originating from private lands; or

(B) Such person has exported unprocessed timber originating from private lands during the preceding 24-month period.

Proposed § 223.189(a)(3) stated that no person may acquire unprocessed timber from Federal lands if the person transfers unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States to a third person, and that third party or successive parties export that unprocessed private timber. The third

party or successive parties who acquire such unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 states may not export such timber.

Proposed paragraph (a)(3) would reduce the potential for violations of the substitution prohibition. The potential is particularly high in multiple transfers of unprocessed timber originating from private lands in which any of the parties acquire or wish to acquire Federal timber. The paragraph would protect the person who acquires unprocessed Federal timber and transfers unprocessed private timber from a possible substitution violation by making it unlawful for the person acquiring the private timber to export it.

The Act exempts from these prohibitions persons with historic export quotas. The 24-month restriction is waived by a certification process described in § 490 of the Act, and § 223.189 (c) and (d) of the proposed rule.

Nineteen public comments were received on this section.

*Comment.* Several respondents said that the certification language should indicate that the individual signing the certification on behalf of a corporation is doing so in his or her capacity as an officer or agent of that corporation, not in a personal capacity.

Several respondents also commented that a corporation's Chief Executive Officer should not necessarily be required to sign the certification, since the Chief Executive Officer may have limited knowledge of the firm's acquisition and disposition of unprocessed timber. These respondents suggested that a designated officer or agent of the corporation be permitted to sign the certification on behalf of the corporation.

*Response.* The certification language holds the corporate officer signing the certification liable in a corporate capacity, not a personal capacity. The certificate must be signed by someone with authority to bind the corporation. The Department prefers to have the signature of the official with clear authority to bind the corporation, the Chief Executive Officer: it would be difficult for the Department to determine if officers, other than the Chief Executive Officer, could bind the corporation. This requirement is similar to the requirement in 36 CFR 223.171(b)(6)(1992), issued pursuant to the Federal Timber Contract Payment Modification Act (16 U.S.C. 618), with which participating timber purchasers complied. In that regulation, the Chief Executive Officer is required to sign a statement for a corporation certifying

the accuracy of information submitted. The Chief Executive Officer need not have personal knowledge of the information which he or she is certifying, but must ascertain that the information is true, complete, and accurate to the best of his or her knowledge and belief.

*Comment.* One respondent wrote that certifications should not be binding if a person or corporation later decides to stop buying Federal timber.

*Response.* The Department declines to adopt this proposal. As discussed earlier, the final rule adopts and amended the definition of "substitution", which states that substitution occurs when a person exports during any calendar year in which the person has Federal timber in the person's possession or under contract within the same geographic and economic area.

*Comment.* One respondent objected to implementation of the interim rule before the public had a chance to comment on it.

*Response.* The Department would have preferred prior notice and comment; however, for the reasons set forth in the preamble to the interim rule, immediate implementation was necessary. Comment on the interim rule was provided for in the proposed rule. These comments have been analyzed in this rule.

*Comment.* Three respondents asked that provisions for requesting waivers of 24-month prohibition against purchasing Federal timber following export of private timber indicate when and under what circumstances waivers will be granted.

*Response.* The waiver of the 24-month prohibition was available only to applicants applying by December 20, 1990. Acceptance or rejection of waivers depended upon the Administrative Law Judge's ruling on sourcing area applications. That ruling has occurred, and applicants have been notified of those decisions. In addition, the Forest Service has sent letters advising each applicant of the status of its sourcing area application and request for waiver. Therefore, no change in the rule is necessary. Persons whose waivers were disapproved are not bound by the request for the waiver (36 CFR 223.189(g)(2)).

*Comment.* One person commented that the rule should clarify that persons signing the waiver of the 24-month prohibition, which requires export to cease for three years, may not export within the sourcing area for as long as the sourcing area is approved.

*Response.* The Department agrees with this comment. Therefore, in

response to this comment, the Department has added a sentence to proposed paragraph (f), now paragraph (5) of § 223.189(f), stating that persons signing the waiver, like all sourcing area holders, may not export unprocessed private timber originating from within the sourcing area.

*Comment.* Several respondents asked for clarification regarding whether a person who may not purchase unprocessed Federal timber may purchase unprocessed private timber from a person who may purchase unprocessed Federal timber.

*Response.* A person who may purchase unprocessed Federal timber may purchase unprocessed private timber from someone who may purchase unprocessed Federal timber, provided that the person purchasing the unprocessed private timber does not export the private timber if the timber must be domestically processed (e.g., if the private timber originates from within a sourcing area).

Proposed paragraph (a)(3) has been rewritten to clarify that a person may not purchase unprocessed Federal timber in the west if the person transfers unprocessed private timber from the west *that requires domestic processing*, to a third party, if that party or successive parties exports the unprocessed private timber. The last sentence concerning the prohibition against third or successive parties exporting such timber has also been modified to state that the restriction applies to private timber that requires domestic processing. The restrictions in paragraph (a)(3) are meant only to apply to timber requiring domestic processing, to follow the intent of the Act, which provides certain exemptions allowing for the purchase of unprocessed Federal timber and the export of unprocessed private timber.

*Comment.* Several respondents expressed concern that they could lose their right to buy Federal timber and be in violation of the substitution prohibitions, if a party to whom they sell unprocessed Federal timber exports private timber.

*Response.* Section 492(a)(2) of the Act (16 U.S.C. 620d(a)(2)) states that a person who transfers unprocessed Federal timber will provide to the person acquiring such timber a written notice regarding the Federal origin of the timber, and receive from such party written acknowledgment of the notice and an agreement to comply with the requirements of the Act. 36 CFR 223.193(b) implements section 492(a)(2) of the Act (16 U.S.C. 620d(a)(2)), and provides procedures to follow when timber from Federal lands is transferred

to another person. To implement this provision, the Department has developed forms intended to relieve the seller of liability if subsequent buyers violate the export or substitution restrictions of the Act. A seller or buyer who cannot produce the appropriate document upon request could be found in violation of the Act. Accordingly, no change in the rule is necessary to respond to the concern.

*Comment.* One respondent expressed concern that the rule makes the Federal purchaser who sells private timber responsible for the acts of subsequent purchasers of private timber. One respondent suggested that persons with sourcing areas who sell private timber originating from the sourcing area be required to notify the buyer that such timber must be domestically processed.

*Response.* In order to protect Federal purchasers from the actions of subsequent private purchasers, the proposed rule included an acknowledgment of the prohibition, and an agreement to notify subsequent holders of the timber and marking requirements for unprocessed private timber. These requirements have not been changed in the final rule. 36 CFR 233.194. The Department has clarified § 223.189(a)(3) to state that a person may not purchase unprocessed Federal timber if the person exports or sells for export unprocessed private timber that requires domestic processing.

*Comment.* In connection with private timber monitoring, one respondent asked whether the prohibition against a Federal purchaser's selling private timber for export applies when the Federal purchaser sells "cutting rights" to the private timber. This respondent also asked if the prohibition applies when the Federal purchaser sells private land and timber.

*Response.* Since "cutting rights" are basically a timber sale, private timber acquired in this manner would be subject to the prohibition against substitution. If land with timber on it is sold, the purchaser would be evaluated separately from the seller, unless the purchaser and the seller are the same "person" under the definitions in the Act and in these regulations (for instance, if they are affiliated). However, if the land is sold, and the seller reacquires the cut over land within 24 months of the original sale, that person would be subject to the prohibition against substitution. Current definitions in the statute and the rules govern this situation. No change to the rule is necessary in response to this comment. It should be noted that the sale of land encompassing part or all of a sourcing area, and/or the sale of the sourcing area

facility, being a change in circumstances, will trigger a review of the sourcing area.

*Comment.* Several respondents suggested that the rules exempt surplus species from substitution prohibitions.

*Response.* The Department agrees with this comment. While the Act specifically exempts surplus species from the prohibition against export of unprocessed Federal timber, it does not exempt surplus species from the prohibition against substitution. However, the intent of the prohibition against substitution supports the exemption of surplus species from the prohibition against substitution. The Conference Report states that, "[t]he general reason for limiting substitution is to restrict companies from purchasing Federal timber for their mills and then exporting private timber from the same general area." (Conf. Rpt. at 252.) Presumably, the private timber that is exported would be processed in the mill if Federal timber could not be purchased for that purpose. A species may be declared surplus to domestic needs if there is no domestic market for the species. If there is no domestic market, there would be no manufacturing of that species in domestic mills. The purchase of the surplus species would not facilitate the purchaser's exporting of private timber by providing Federal timber for the purchaser's mill. Therefore, there is no reason to subject surplus species to the prohibition against substitution. Accordingly, a new paragraph (a)(4) of § 223.189 has been added to the final rule to exempt surplus species from the prohibition against substitution, and states: "The prohibitions in paragraphs (a)(1)–(3) shall not apply to specific quantities of grades and species of unprocessed timber which the Secretary of Agriculture has determined to be surplus to domestic manufacturing needs."

Paragraph (a)(1) of the proposed rule (now paragraph (a)(1)(A)) has been modified to reflect the modified definition of substitution. Paragraph (a)(2) has been added to the prohibitions against substitution to parallel when substitution occurs, pursuant to the definition in § 223.186. Paragraph (a)(2) concerns the prohibition against exporting unprocessed private timber and purchasing unprocessed Federal timber in the same geographic and economic area in the same calendar year. Explanations of these modifications may be found in the preamble discussion of the definition of substitution.

Paragraph (3) has been added to § 223.189(e) to clarify that a portion of

National Forest System timber from Washington State is exempt from the prohibition against indirect substitution, pursuant to § 223.203. Section 223.189(f) has been revised by adding paragraph (4) to reflect the revised definition of substitution. The revised definition of substitution includes the export of unprocessed private timber during any calendar year that a person has unprocessed Federal timber in possession or under contract.

Having considered the comments addressing § 223.189, the Department is adopting this section as proposed with the changes to the provisions as discussed.

#### *Section 223.190 Sourcing Area Application Procedures*

Subsection 490(c) of the Act (16 U.S.C. 620b) requires the Secretary of Agriculture to prescribe procedures for applying for approval of a sourcing area. At a minimum, the procedures shall require the applicant to state the location of private lands from which, in the previous year, the applicant has harvested or otherwise acquired unprocessed timber which was exported from the United States; and the location of each timber manufacturing facility owned or operated by the applicant within the proposed sourcing area boundaries from which the applicant proposes to process timber originating from Federal lands.

The Act also requires that the Secretary provide the opportunity for a hearing on the application and that approval or disapproval be on the record.

Any sourcing area approval must be based on a determination by the Secretary that the area includes the manufacturing facilities at which the applicant expects to process the Federal timber, and that the area is geographically and economically separate from any area from which that person harvests for export any unprocessed timber originating from private lands.

The Secretary also shall consider equally the timber purchasing patterns of the applicant on private and Federal lands with those of other persons in the same local vicinity and the relative similarity of such purchasing patterns. The interim rule defined manufacturing facilities in the "same local vicinity" as those facilities located within 30 miles of the community where the applicant's facility is located. However, the term "same local vicinity" may include more distant communities if manufacturing facilities in those communities depend on the same source of timber and have similar purchasing patterns. Thus, the

relative similarity of purchasing patterns would be determined by examining the location and similarity of unprocessed timber being acquired for the affected facilities.

Nine respondents commented on this section of the rule.

*Comment.* Several respondents indicated that the final rule should specify who may apply for a new sourcing area or request modification of an existing sourcing area, and what time constraints might apply.

*Response.* The Department agrees with the suggestions to state who may apply for a sourcing area. A person who is not an exporter, or is not affiliated with a person who exports, may not apply for a sourcing area. The Act states that the Secretary may approve a sourcing area if the area where the applicant desires to purchase Federal timber is economically and geographically separate from the area from which that person "harvests for export" unprocessed private timber (16 U.S.C. 620b(c)(3)). The language is clearly geared towards current exporters. Further, a person who does not export does not need a sourcing area.

In contrast, person need only "desire" to process Federal timber in order to apply for a sourcing area (16 U.S.C. 620b(c)(3)). In fact, a person could not both be processing Federal timber outside of an approved sourcing area and exporting unprocessed private timber without violating the prohibition against substitution. The "desire" to process Federal timber may include the intent to acquire or become affiliated with a mill that processes Federal timber. In the case of an affiliation, the Department must have written confirmation that the sourcing area applicant intends to acquire or affiliate with a mill that processes Federal timber as soon as the sourcing area is approved. This will prevent persons from obtaining a sourcing area when one is not needed; in other words, when both processing Federal timber and exporting private timber are not occurring. In order to clarify that the "desire" to process Federal timber may include the intent to acquire or become affiliated with a mill that processes Federal timber, and that written proof of this intent is required when applying for a sourcing area, the Department has expanded paragraph (a) for § 223.190 of the rule as follows: "Subject to the restrictions described in § 223.189 of this subpart and, except as provided in paragraph (b) of this section, a person who owns or operates a manufacturing facility and who exports unprocessed timber originating from private lands

may apply for a sourcing area in accordance with the procedures of this section. However, an owner/operator of a manufacturing facility who exports unprocessed timber originating from private lands may not possess or acquire unprocessed timber originating from Federal lands unless the acquisition is within an approved sourcing area. A person who intends to acquire or become affiliated with a manufacturing facility that processes Federal timber and who is an exporter may apply for a sourcing area. Written proof of the intent to acquire or affiliate must be included in the sourcing area application, signed by the applicant and the person or, in the case of a corporation, the Chief Executive Officer, whose company the applicant intends to acquire or affiliate with. This certification must be on letterhead and must be notarized. A sourcing area application that the Secretary determines would be approved will be granted tentative approval pending final notification by the applicant of acquisition of or affiliation with the manufacturing facility. The tentative approval of the sourcing area will lapse unless the acquisition or affiliation occurs within 30 days of the tentative approval of the sourcing area. A sourcing area is not valid until final approval of the sourcing area.

The direct substitution prohibition did not apply to a person who applied for a sourcing area on or before December 20, 1990. A request for modification of an existing sourcing area shall trigger a review pursuant to the procedures and restrictions in § 223.191(e)."

*Comment.* One respondent suggested that marking a private timber source on a map was adequate. Another respondent stated that the exact location of timber sales for exported timber need not be identified.

*Response.* The Act requires that sourcing area applicants provide the Secretary with the "location of private lands from which such person has harvested or otherwise acquired" exported timber (16 U.S.C. 620b(c)(A)). While the Act does not require the identity of individual timber sales, it does require the identity of the lands where timber sales were purchased. No change in the rule is necessary.

*Comment.* Several respondents thought that sourcing area applicants should be required to show where private and federal timber had been acquired in the previous 24 months in order to provide information on "timber purchasing patterns on private and federal lands of the applicant." The Act requires consideration of this factor in

the determination of an economically and geographically separate sourcing area. One respondent thought that sourcing area applicants should be required to document that no private timber had been exported from within the area that is the subject of the application, since the Act provides for the sourcing area exemption if a person has not exported unprocessed private timber from within the sourcing area in the previous 24 months.

*Response.* The Department has records of timber sale purchases on Forest Service lands, so the applicant need not provide this information. An application encompassing lands administered by other federal agencies would be reviewed by those agencies. As far as information regarding private timber purchases, 16 U.S.C. 620b(c)(2)(A) of the Act and § 223.190(c)(1)(iii) of the interim rule (and this final rule) require that applicants provide information on the location of private timber purchases in the previous 12 months. The Forest Service can verify these purchases and the purchases of others in the area through Forest Service records and, in the case of private timber purchases, through state harvesting permits, severance or yield tax records, industrial safety records and by other means. The Department believes that this information is sufficient to determine whether a sourcing area is economically and geographically separate from an applicant's exporting area.

However, the Department agrees that the Act requires that persons with sourcing areas may not have exported unprocessed private timber originating from private lands within the previous 24 months. To clarify implementation of this requirement, the Department has amended the requirement in paragraph (iii) of § 223.190(c)(1) to read as follows: "The location of private lands within and outside the desired sourcing area where the person has, within the 24 months immediately preceding the date of the application, acquired unprocessed timber originating from private land which was exported \* \* \*." The Act requires sourcing area applicants to provide "at a minimum \* \* \* information regarding the location of private lands within the previous year" from which the person has harvested or otherwise acquired unprocessed timber for export (16 U.S.C. 620b(c)(2)(A)). Given the Act's requirement that no export has occurred within the sourcing area in the previous 24 months, requiring information regarding private timber purchases for the previous 24 months comports with



the Act's requirements. The Act's requirement of a year's worth of information addresses the application process. Rather than obtaining additional information from the applicant during the adjudication process to determine whether exporting has occurred during the previous 24 months within the proposed sourcing area, the Department believes it is more efficient to obtain all of the information at once. This information is required for sourcing area applications submitted on or after September 8, 1995. Further, the Department has added a sentence to the certification that accompanies the sourcing area application in § 223.190(c)(4). The sentence reads as follows: "I certify that I have not exported unprocessed timber originating from private lands within the boundaries of the sourcing area that is the subject of this application in the previous 24 months."

*Comment.* One respondent suggested that a map of haul roads used for timber sourcing the manufacturing facility be included in the application, and that the rule clarify that the application be public information.

*Response.* The interim rule already required a map of the intended sourcing area (36 CFR 223.190(c)(1)). The Department believes that this is sufficient, along with the records of timber sale purchases, to meet the Act's requirements without requiring that haul roads be identified.

The interim rule states that applications are not confidential information (36 CFR 223.190(d)). The rule acknowledges that some information may be deemed confidential under the Freedom of Information Act. Therefore, the rule allows applicants to mark such information for consideration of confidentiality. This information should not hinder other parties in their review of sourcing area applications.

*Comment.* One respondent stated that overlapping sourcing areas of different applicants caused concern regarding complexity of administration.

*Response.* Each sourcing area application is adjudicated on its own merits. As long as each sourcing area application meets the criteria in the Act and the regulations, it will be approved. It is likely that different applicants will have valid sourcing areas that overlap. Overlapping sourcing areas will increase the complexity of administration and will require strict accountability and tracking. No change in the rule is necessary.

*Comment.* One respondent thought that the substantive standard for

evaluation of a sourcing area should be clearly stated.

*Response.* The Department believes that the standard for evaluation was stated clearly in 36 CFR 223.190(h)(5) (now 36 CFR 223.190(i)) and no change is necessary.

*Comment.* One respondent stated that the definition of "same local vicinity" is too broad and does not accurately reflect the intent of Congress. Another respondent said that the final rule should specify that the applicants need only identify those competitors located within 30 miles known by the applicant to have similar sourcing patterns and products. Several respondents said that the term "same general vicinity," found at 36 CFR 223.190(c)(2), should be defined. Another respondent stated that the only reason "same local vicinity" seems to encompass mills beyond 30 miles in the regulations is for notice and commenting purposes; if the Department wants input from a broader spectrum, it should change the notice requirements, but persons beyond the "same local vicinity" should not be weighted equally with those in the same local vicinity.

*Response.* The Act at 16 U.S.C. 620b(c)(3) requires that the Secretary consider the timber purchasing patterns of the applicant as well as other persons "in the same local vicinity." In implementing this requirement, the interim rule used the guidance in the Conference Report and stated that "same local vicinity" is normally the manufacturing facilities located within 30 miles of the community where the applicant's manufacturing facility is located. However, this definition alone is inadequate to cover the Act's requirement to consider timber purchasing patterns, so the interim rule stated that the "same local vicinity" may include more distant communities if those communities are dependent on the same source of timber and have similar purchasing patterns. Applicants are required to provide this information, to the best of their knowledge, since they would be the primary source of this information.

"Same general vicinity" was a typographical error, which has been corrected to read, "same local vicinity." The notice requirement is meant to notify those persons whose purchasing patterns would be relevant to the sourcing area application. No change in the rule is necessary.

*Comment.* One respondent suggested that only the predominant activities of other mills should be considered in determining the "relative similarity of purchasing patterns" in 36 CFR 223.190(h)(5)(iii) (now 36 CFR

223.190(i)(3)). The respondent stated that one-time purchase of federal timber should not be compared to a dozen purchases by a competitor.

*Response.* Pursuant to the Act, the Department considers only purchasing patterns. An anomalous sale would not be considered a pattern. No change is necessary in the rule in response to this comment.

Further review of the sourcing area procedure has indicated that the similarity of products being produced by the applicant and other manufacturing facilities in the same local facility, as specified under paragraph (iii) of § 223.190(h)(5) of the interim rule and proposed rule (now paragraph (3) of § 223.190(i)), is not significant in determining the "relative similarity of purchasing patterns." The major factor needed to determine the similarity of purchasing patterns is whether the timber that competing purchasers bid on and bought was similar. This criterion was already included in paragraph (h)(5)(iii) (now paragraph (i)(3)).

Accordingly, paragraph (i)(3) of § 223.190 in the rule has been revised to eliminate consideration of the similarity of products being produced by competing facilities in the same local vicinity as a factor to determine the similarity of purchasing patterns.

*Comment.* Several respondents stated that sourcing areas should be approved as requested if there is no "credible opposition" to the application.

*Response.* The Act establishes specific criteria by which the Secretary may approve an application. The Secretary may approve an application "only if" the Secretary determines that the requested sourcing area is economically and geographically separate from the area from which the applicant harvests private timber for export (16 U.S.C. 620b(c)(3)). Thus, regardless of the extent of opposition to an application, the Secretary must make an independent determination using the standards established by the Act.

*Comment.* Several respondents stated that applicants should be allowed to provide supplemental information after submission of the application if other parties raise issues or questions about the application.

*Response.* The Act requires the sourcing area determinations to be made "on the record and after an opportunity for a hearing" (16 U.S.C. 620b(c)(3)). This process, pursuant to the Administrative Procedure Act (5 U.S.C. 554), requires the Department to give parties an opportunity for submission and consideration of facts, arguments and offers of settlement when time and

the public interest allow. Applicants must submit the information required by the Act and implementing regulations in order for the application to be processed, regardless of additional information that may be supplied pursuant to the formal adjudication.

*Comment.* One respondent suggested that this section should state that a sourcing area applicant need not submit a sourcing area application to the Bureau of Indian Affairs, even if the Bureau's lands are part of the proposed sourcing area.

*Response.* In defining "Federal lands," Section 493 of the Act (16 U.S.C. 620e) specifically excludes Indian and Native Corporation lands. This exclusion is repeated in § 223.186 of this rule. The Department feels these exclusions are adequate and declines to repeat these exclusions in this section of the rule.

*Comment.* Another respondent suggested that this section be revised to limit the persons entitled to request a hearing to the applicant and other applicants for the same competing sourcing area.

*Response.* The Department disagrees. Section 490(c)(3) of the Act directs the Secretary to approve or disapprove an application, "on the record and after an opportunity for a hearing." Use of this specific language places the Act under the provisions of the Administrative Procedures Act, which requires public involvement in the decision-making process.

*Comment.* One respondent stated that section 556(d) of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*), the statute governing the administrative process by which sourcing area determinations are made, does not require a full, evidentiary hearing, but allows for a hearing based in part or in full on written submissions.

*Response.* Section 556(d) of the Administrative Procedure Act states that, "(i)n rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form" Sourcing area applications are not claims, for either money or benefits. Sourcing area applications may be viewed like a "license," in which case, submission of the evidence could be in written form. However, the agency has sole discretion to adopt procedures for a hearing based solely on written evidence, and only when a party will not be prejudiced. Based on the initial round of sourcing area applications, in which the ability to cross examine witnesses and to bring all

parties together was significant in making fair, informative determinations, the Department declines to adopt this suggestion.

*Comment.* One respondent suggested that final regulations should state explicitly that firms with domestic mills in approved sourcing areas may use non-Federal unprocessed timber from outside an approved sourcing area to supplement their log supply.

*Response.* The Act provides for the specific exemption from the prohibition against substitution in the form of sourcing areas. Sourcing areas have specific requirements. Among these requirements is that sourcing areas include all of the private and Federal lands that source the manufacturing facility (36 CFR 223.186). To haul unprocessed private timber originating outside of the sourcing area into the sourcing area violates the approved sourcing area boundary. The area from which the sourcing area holder harvests for export has exported unprocessed timber is no longer geographically and economically separate from the area from which the person sources the manufacturing facility (16 U.S.C. 620b(c)(3)). Once the sourcing area holder is no longer abiding by the sourcing area boundaries, the sourcing area holder may no longer depend on the valid exemption from substitution that a sourcing area provides. The sourcing area holder would then be in violation of the sourcing area boundary, as well as the prohibition against substitution by having purchased unprocessed Federal timber west of the 100th meridian in the contiguous 48 States within 24 months of having exported unprocessed private timber from the west. In order to clarify this issue, the Department has added paragraph (k) to § 223.190 that states as follows: "Transporting or causing to be transported unprocessed private timber from outside of a sourcing area into a sourcing area by the holder of the sourcing area is prohibited as a violation of the sourcing area boundary. Such violation will cause a review of the sourcing area, and could subject the sourcing area holder to the penalties and remedies for violations of the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, *et seq.*, and its implementing regulations."

*Comment.* One respondent stated that the regulations should clarify when a sourcing area is "in effect."

*Response.* An approved sourcing area is in effect until the holder of the sourcing area relinquishes it, or the sourcing area is disapproved upon review of the sourcing area. A sentence

clarifying this has been added to new paragraph (m) of § 223.190.

*Comment.* Several respondents stated that a person with an approved sourcing area should be allowed to relinquish the sourcing area and then export timber from private lands in that area at any time.

*Response.* The Department disagrees with this comment. While a person with an approved sourcing area may relinquish the sourcing area at any time, the person may not begin exporting from that area immediately. A person may not export unprocessed private timber as long as that person has unprocessed Federal timber in the person's possession or under contract in the same fiscal year, pursuant to the definition of substitution in § 223.186. To clarify this issue with regard to sourcing areas, the Department is amending § 223.190 by adding paragraph (1). Paragraph (1) states that sourcing areas may be relinquished at any time provided the following certification waiver is signed:

"I am relinquishing the approved sourcing area, described in the Secretary's determination in FSAA \_\_\_\_\_ on \_\_\_\_\_, 19\_\_\_\_. I understand that I may not export unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States during a fiscal year in which I have unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States in my possession or under contract, pursuant to the prohibitions against substitution in the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) ("Act") and its implementing regulations. I also understand that I may not purchase unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States within 24 months of having exported unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States, pursuant to the prohibition against substitution in the Act and its implementing regulations. I make this certification with full knowledge and understanding of the Act and its implementing regulations and do fully understand that exporting unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States during a fiscal year in which I have unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States in possession or under contract, or purchasing unprocessed timber originating from Federal lands west of

the 100th meridian in the contiguous 48 States within 24 months of having exported unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States is a violation of the substitution provisions of the Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

The certificate must be signed by the person making such certification or, in the case of a corporation, by its Chief Executive Officer; must be on company letterhead; and must be notarized.

*Comment.* One respondent had several comments about the certification that accompanies the sourcing area application, found at 36 CFR 223.190(c)(4). First, the respondent recommended striking the phrase "concerning my timber purchasing and export patterns" from both the first and second sentences. The respondent stated that applicants should certify to the truth of the entire application, not just the purchasing and export activities, and that the certification could be misunderstood to require applicants to submit information not otherwise required. The respondent further stated that the certification incorrectly cites section 492 in order to prohibit the export of unprocessed private timber. The respondent contends that nothing in the Act prohibits the export of private unprocessed timber.

*Response.* The Department disagrees that the certification language "concerning my timber purchasing and export patterns" should be deleted. Complete and accurate information regarding an applicant's timber purchasing and export patterns is crucial to the determination of whether an applicant's intended Federal timber purchasers are economically and geographically separate from the applicant's exporting area. Regarding the reference to section 492, the Department agrees that this citation could benefit from some clarification. Therefore, the Department is changing the reference to section 492 to a general reference to the entire Act, to ensure that applicants review the entire Act for potential violations. The new citation will be 16 U.S.C. 620, *et seq.* The Department is also deleting the reference to the requirement to cease purchasing unprocessed Federal timber within the proposed sourcing area if the sourcing area is disapproved, since only initial applicants could have been purchasing unprocessed Federal timber before the sourcing area's approval. The Department has also added the phrases

"and its implementing regulations" to the sentence about the prohibition against exporting unprocessed private timber from within an approved sourcing area. While these changes may clarify the certification language, the Department believes that the original certification published in the interim rule was sufficiently clear. Applicants signing the initial certification are bound by that certification.

*Comment.* One respondent stated that in order for the Secretary to "consider equally" competitors' practices, the Forest Service should have information from the competitors that is as complete and reliable as the applicant's information. Several respondents said that persons submitting information should have to certify that information provided is complete and accurate. The respondent also said that the complete sourcing information of all competitors from the same local vicinity should be examined, not just a contesting competitor.

*Response.* The Department agrees that complete and accurate information regarding competitors is necessary to determine whether a sourcing area should be approved. The Department makes its own independent assessment of competitors in the same local vicinity based on information submitted, including the Forest Service's records. The Department does not believe that competitors need to provide certain information; the information received is weighted based on its completeness and accuracy, as judged against other submissions. The Department does agree, however, that parties to a sourcing area determination should certify to the truth of what they are providing. Therefore, the Department is amending 36 CFR 223.190 by adding a new paragraph (j) that states that a person submitting a written comment certify at the end of the comment, but before the signature that the information provided is true and accurate, to the best of the person's knowledge, and that failure to provide true and accurate information could be a violation of the False Statements Act (18 U.S.C. 1001).

*Comment.* One respondent stated that the agency should show which boundaries the Department would approve, and permit the applicant to revise its application to match those boundaries. Another respondent said that sourcing area applications should not simply be denied, but that applicants should be able to modify the proposed sourcing area.

*Response.* The Act does not require the Department to provide the boundaries that the agency would accept except for applications received

by December 20, 1990 (16 U.S.C. 620(c)(4); 36 CFR 223.191). However, the procedures provided for recommended settlements and adjustments during the initial application process, and will provide the same opportunities for subsequent applications.

*Comment.* One respondent said the rule should state that a person may apply for a sourcing area at any time, but will receive certain advantages if the person applied by December 20, 1990.

*Response.* The Department believes this was clarified in the final rule of limited scope, published on December 19, 1991 (56 FR 65834). The sections of that rule that have information about sourcing areas may be found at 36 CFR 223.191, and have been repeated in this rule making for clarity.

The rule making that established the procedures for sourcing area applications and reviews of sourcing areas made technical amendments to this section to conform it to the procedures. Additional technical amendments were made in this rule making to conform it to the procedures. Otherwise, except as noted earlier, this section is adopted as proposed.

#### *Section 223.191 Sourcing Area Disapproval and Review Procedures*

Section 223.191 was included in the interim rule, published November 20, 1990 (55 FR 48572), and was revised by the final rule published in the **Federal Register** on December 19, 1991 (56 FR 65834). The rule making that established the procedures for sourcing area applications and reviews of sourcing areas made technical amendments to this section to conform it to the procedures. No changes were proposed or are being made to this section by this rule making. Section 223.191 is included in this final rule for continuity and to avoid confusion as to its status.

#### *Section 223.192 Procedures for a Non-Manufacturer*

Section 223.192 gives non-manufacturers the opportunity to make the same business decisions as manufacturers; that is, whether to export unprocessed private timber or buy Federal timber. However, because the non-manufacturer does not have a manufacturing facility, the non-manufacturer cannot establish a sourcing area.

Five responses were received from the public on this section of the rule.

*Comment:* All five respondents commented that they could find nothing in the Act preventing non-manufacturers from having sourcing

areas, or required that timber be processed by the original purchaser. The parties said that the final rule should allow non-manufacturers to apply for sourcing areas from within which such a person could buy Federal timber, but not export timber from private lands.

Several of these respondents stated further that controls on indirect substitution prevent abuses, and that there is no reason to limit competition for Federal timber further by preventing non-manufacturers from bidding in areas that are economically and geographically separate from any areas from which they and their affiliates may export private timber.

**Response.** The Department disagrees with these comments. The exemption that allows a person to purchase Federal timber while exporting private timber is the sourcing area exemption. The Act clearly directs the sourcing area exception to the prohibition against substitution toward persons with manufacturing facilities. Subsection 490(c)(3) of the Act (16 U.S.C. 620(c)(3)) states that the Secretary may approve the application, "only if \* \* \* the area that is the subject of the application, in which the timber manufacturing facilities at which the applicant desires to process timber originating from Federal lands are located" is geographically and economically separate from lands from which the applicant exports. Further, subsection 490(c)(2) of the Act (16 U.S.C. 620b(c)(2)) requires information from the applicant regarding the location of each timber manufacturing facility "owned and operated" by the applicant. This scheme clearly indicates that Congress intended the Act to limit the sourcing area exception to persons who both export private timber and manufacture timber domestically. Therefore, the Department declines to adopt these comments in the final rule.

Some minor, non-substantive changes have been made to the text of this section as proposed for technical and editorial clarity.

#### *Section 223.193 Procedures for Reporting Acquisition and Disposition of Federal Timber*

**Annual report.** Section 492(a)(1) of the Act provides that each person who, either directly or indirectly, acquires unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States shall report the receipt and disposition of such timber to the Secretary concerned, in such form as the Secretary may, by rule, prescribe; and that such person may not be held responsible for the reporting of the disposition of any

such timber held by subsequent persons. In addition, the Conference Report on this section states that the conferees intend the Secretary of Agriculture to have a complete account of transactions relating to the acquisition and disposition of unprocessed timber originating from Federal lands (Conf. Rpt. p. 259).

The rule (§ 223.193(a)) as proposed would have required that an annual report on the acquisition and disposition of Federal timber be submitted to the Forest Service. Any person acquiring and/or disposing of such timber would be required to submit an annual report.

As proposed, such report would provide, by fiscal year, an accounting of the unprocessed Federal timber acquired, processed, stored, or transferred to another person. The report would require statements regarding the volume of timber acquired, processed, stored and/or transferred to another person, and the origin of such timber. In addition, the report would require the date of acquisition or disposal, from whom acquired, the timber sale name, the contract number, log brands, bar coded tag number and other markings for timber acquired or disposed. The rule as proposed would require submission of the first report December 1, 1991, and subsequent reports on December 1 of each year thereafter.

Twenty-seven respondents commented on this section. The comments essentially focused on three topic areas: The need for the annual report; the difficulty in obtaining the unprocessed Federal timber inventory information requested; and the burden that the information requirement would place on individual companies.

**Comment.** Comments received questioning the need for the annual report were as follows:

- Annual reporting requirements are not necessary and they are unduly burdensome.
- An annual report may be appropriate for holders of the State of Washington indirect substitution quotas, but should be limited to the facts necessary to show that the quota has not been exceeded.
- The Act does not require retention of these and other records for three years.
- The annual report is redundant; the Department already has this information through the tracking system and/or at the end of each sale.

**Response.** Section 492 of the Act (16 U.S.C. 620d(a)) states that each person who acquires unprocessed Federal timber, directly or indirectly, shall

report to the Secretary the receipt and disposition of such timber. The Secretary will prescribe in the rule the form of the report, which would include frequency. Section 492 of the Act also requires the Secretaries of Agriculture and the Interior to report to Congress on the disposition of unprocessed Federal timber in the west and the practice of indirect substitution, based on the information gathered in subsection (a) (16 U.S.C. 620(b)). Form(s) and reporting frequency as shown in the final rule are those considered to be the minimum necessary to meet the Act's requirements of reporting and monitoring. Retention of these records for three years is important for monitoring purposes, as logs are often in commerce for several years. The annual report is not redundant. The annual report informs the Department as to what volume has been processed and what volume has been exported; the transfer documents inform the Department as to the commercial path of timber. Taken together, these documents allow the Department to track timber from the first purchase through processing or exporting. Further, information gathered at the end of each sale does not account for annual processing of Federal timber by third parties, which the annual report will do.

**Comments.** Several respondents commented that the information for the annual report required by pre-enactment rules at § 223.48 is sufficient to meet the accounting requirements of the Act, and strongly objected to the volume inventory reporting requirement in the proposed rule. Specific comments included the following:

- Logs generally are sorted by species, size, or grade, and are placed into corresponding storage decks. These decks contain logs from all origins. Tracking such logs by origin would be very costly and impractical.
- To comply with the rule, a purchaser may be forced to buy more land and expand the log yard to accommodate the additional decks needed to separate logs according to origin as well as species, size, grade, etc.
- There is no way to determine the actual volume of Federal timber held in inventory without making estimates at the mill.
- Inventory tagging of each log is possible, but costly. Moreover, tags are easily lost in handling, and many purchases do not have computers and scanners to handle tags.
- The rules would require the scaling and labeling of every log, in addition to branding and marking.
- It is proper to maintain requirements for sale-by-sale disposition

of Federal timber on an annual basis, but 100 percent accountability of each individual log cannot be achieved.

*Response.* The Department agrees with many of these concerns. Accordingly, the Department has removed the requirements to report volume in inventory at the beginning and end of the year. Otherwise, other than as noted, the Department has adopted the form as proposed, with minimal changes in titles, instructions, and certification language. The information requirements in paragraphs (a)(1) through (a)(7) of § 223.193 in the proposed rule have been reduced and revised in new paragraphs (a)(1) through (a)(5) in this rule as discussed below.

The Department believes that information regarding individual logs acquired is not onerous and provides the Department with information to track logs as required by the Act. Brands other than brands registered by a State or agency are required to have a pictorial representation on the form for purposes of identification, since they do not have registration numbers. Contracts awarded before August 20, 1990, require purchasers to submit an annual report on form FS-2400-46, *Purchaser Certification of Timber Domestically Processed or Exported* (OMB No. 0596-0021, Expires March, 1997). The annual report under § 223.193 of this final rule will be very similar to the present reporting form. Like the present reporting form, the annual report under § 223.193 will include a requirement to record the volume of unprocessed private timber exported. This can be found in new paragraph (4) of § 223.193 of this rule.

The major differences between the present form FS-2400-46 and the new annual reporting form are as follows: (1) The form title is changed to read "Certification of Receipt and Disposition of Timber Originating from National Forest Lands"; and (2) the instructions state that any person who directly or indirectly acquired or processed timber originating from National Forest System lands in the previous calendar year must complete the annual report. The Department has changed the final rule to require the annual report by calendar year, rather than fiscal year, because of the purchasers' familiarity with reporting by calendar year and to provide consistency with prohibitions in the regulations.

The Department wants to clarify that actual volume must be reported. In order to monitor and investigate transactions, and to prosecute violations of the Act, the Department must have the actual volume recorded. This will

enable the Department to validate the accuracy of the information submitted. Further, the Department will be able to meet the Act's requirement to submit the report to Congress based on the information gathered. Further, the Department needs actual volume recorded in order to monitor the annual quota exempted from the indirect substitution prohibition in Washington State. Third party scaling organizations have the ability to provide accounting reports, and do so as a matter of course, which will reduce the reporting burden.

*Comment.* Several persons commented that if annual reports are required the first one should not be due before the rules have been in effect for the previous year.

*Response.* The Department agrees. The first annual report will be for the first calendar year in which the rules are published with the first report due March 1 following the first reporting period. Calendar years prior to the rule's publication will be reported on the current FS-2400-46 form.

*Comment.* One respondent said that the person submitting the annual report should not have to certify that the information is not confidential.

*Response.* The Department has revised this requirement. If a person submitting the annual report would like something to be kept confidential, the person should so mark the information. The Department will then evaluate the confidentiality of the information pursuant to the applicable laws.

A new paragraph, § 223.193(a)(5)(ii), has been added to assure that the certifier is eligible to acquire unprocessed timber originating from Federal lands in accordance with the Act. This certification is needed to help assure that the requirements of the Act are enforceable.

A new paragraph, § 223.193(a)(5)(iv), has been added to require the retention of the form and records for three (3) years and to make them available for inspection to authorized Federal officials on request. Retention of these records for three years is important for monitoring purposes and for enforcement of the Act, as logs are often in commerce for several years.

#### *Transfer of Unprocessed Federal Timber*

Section 492(a)(2) of the Act states that each person who transfers to another person unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 states shall, before completing such transfer: (1) Provide to the person receiving the timber a written notice which identifies the Federal origin of the timber, (2) receive from that person a written

acknowledgment of the notice and an agreement that person will comply with the Act, and (3) provide the appropriate Regional Forester, or other official to whom such authority has been delegated, with copies of all such notices, acknowledgments, and agreements.

Section 223.193(b) of the proposed rule would require each person who transfers unprocessed timber originating from National Forest System lands to provide such other person with the notice, acknowledgment, and agreement executed on a form provided by the Forest Service. The proposed § 223.193(b) would also require the transferor to provide copies of each such executed form to the appropriate Regional Forester within 10 days of such transfer.

The transferor includes anyone who sells, trades, or otherwise transfers unprocessed Federal timber. The transferor is not only the initial holder of a contract to harvest Federal timber, but is also any person who subsequently acquires the Federal timber, and in turn transfers it to another person.

Proposed § 223.193(b) would require the transferor to state the origin, species, volume, from who acquired, timber sale name, contract number, log brand, bar-coded tag number, and other markings of unprocessed Federal timber on the form. The proposed form would contain a statement that the purchaser of Federal timber, whether directly or indirectly obtained from the Federal government, agrees to maintain records of all transactions involving unprocessed Federal timber for a period of three (3) years from the date of the transfer, and will make all records involving log transactions available to an authorized U.S. Government official upon request.

The proposed form also would include a certificate stating that the information supplied is a true, accurate, current, and complete statement to the best of the transferor's knowledge, and agreeing to send the form to the appropriate Regional Forester or other administering office within ten (10) days of the transfer. The transferor would agree to obtain a fully completed Notice of Origin form from the transferee, and the transferor would acknowledge that failure to report completely and accurately the transfer of unprocessed Federal timber will subject the transferor to the penalties and remedies in the Act and the penalties in the False Statements Act. The transferor would also be required to acknowledge that he or she has read and understands the form. The certification would also require the transferor to

acknowledge that the information provided is not confidential.

*Comments.* Several comments were received on this procedure. Some respondents were concerned that a seller of Federal logs might be held liable for the illegal actions of the buyer or subsequent buyers, or that the seller would be certifying that the buyer will comply with the Act, including the requirement to retain records.

One person stated that the rule should indicate that a timber seller is exonerated from further liability if all necessary notices, certifications, acknowledgments, and record keeping obligations required under the Act are satisfied.

*Response.* Section 492(a) of the Act (16 U.S.C. 620d(a)(1)) states that the transferor of unprocessed Federal logs may not be held responsible for subsequent persons' reports of the disposition of such timber. The transaction reporting form to be supplied by the Forest Service, when properly completed and returned to the Forest Service, will release the seller from such liability.

By completing the form, the seller does not certify that the buyer is legally eligible to purchase unprocessed Federal timber pursuant to the Act. The rules and the form require the buyer of the timber to make that certification. The form is a way to notify the buyer, who may have no direct contact with the Federal government, of the rules to which the purchaser is bound.

However, the Department agrees that a statement clarifying liability should appear in the rule. Therefore, the Department has added to the final rule paragraph (4) of § 223.193(b), which states: "Except as otherwise provided by law, a person who transfers unprocessed Federal timber to another person and meets all notice, certification acknowledgment, reporting and record keeping requirements contained in this section shall be relieved from further liability for such timber pursuant to the Act."

*Comment.* One individual stated that the 10-day period for distribution of the completed transfer document was unrealistically short, especially for a company engaged in a large number of such transactions. Another stated that requiring prompt reporting of such comprehensive information is a substantial and costly burden, particularly given the penalties for misreporting or making a single mistake. Still another stated that a phase-in period should be allowed so that companies can adjust or alter their accounting system to meet these requirements.

*Response.* Effective monitoring and enforcement are dependent on prompt reporting of transfers. All the documents needed to report a transfer are available at the time a transfer agreement is reached, therefore there is little reason that more than 10 calendar days are needed to report that transfer to the Forest Service. The Department also does not believe a phase-in period for complying with these requirements is necessary. The proposed rule has given persons ample time to prepare for compliance with the final rule. Therefore, no change in the final rule is needed.

*Comment.* One respondent said that the certification language in § 223.193(b)(3)(vi) should state, "an acknowledgment of the prohibition against acquiring unprocessed federal timber by a person" who is prohibited by the Act from purchasing unprocessed Federal timber directly from the United States, rather than from a person.

*Response.* The Department does not agree with the comment. The rule already provides that the person acknowledges that he or she may purchase unprocessed Federal timber in accordance with the Act (§ 223.193(b)(3)(ix)). This separate acknowledgment reminds the person acquiring the timber that Federal timber that may not be purchased directly, may not be purchased indirectly either. No change in the rule is necessary.

*Comment.* One respondent stated that the transfer form should be shorter, with an acknowledgment of the requirement for domestic processing of unprocessed Federal timber, and an acknowledgment that the transfer of unprocessed Federal timber to persons who are not qualified to acquire Federal timber constitutes a violation of the Act, and an acknowledgment from the person acquiring the timber that the person will domestically process the timber.

*Response.* The certifications provide that the person receiving the timber knows that the timber must be domestically processed, and that the timber is subject to the prohibition against substitution (§ 223.193(b)(3) (vii) and (ix)). The Department agrees, however, that the person transferring the timber needs to acknowledge that transfer of the timber to persons not qualified to acquire Federal timber constitutes a violation of the Act. Persons not qualified to acquire Federal timber are those who could not acquire that timber directly from the Federal government, in violation against substitution, or those who acquire the Federal timber for export. Completion of the form, including acknowledgment of the buyer's eligibility to acquire the

timber is sufficient to protect the seller of the timber from an invalid transfer (New paragraph (4) of § 223.193 relieves a person of liability if all notices, agreements and acknowledgments in this section are met except as otherwise provided by law). Accordingly, a sentence has been added to the certification at § 223.193(b)(2)(ii) that the certifier acknowledges that the transfer of unprocessed Federal timber to a person who is not eligible to acquire such timber either because of a substitution violation, or because the person is acquiring such timber for export is a violation of the Act.

*Comment.* One respondent stated that a violation of the terms of the certification should not be a violation of the Act, but a violation of the contract.

*Response.* The terms of the certification include an agreement to comply with the Act, and follow procedures to ensure that the government can monitor the transfer of logs, pursuant to 16 U.S.C. 620d(a). Additionally, the Act states that any violation of the Act or regulations implementing the Act is punishable by fines, the amount of which is determined by the specific circumstances. Further, transfer of logs does not always occur within the context of a government contract, although violation of the Act is grounds for canceling a government contract (16 U.S.C. 620d(d)(2)). Therefore, no change is made to the certification language in response to this comment.

*Comment.* One respondent outlined an alternative to the certifications, branding and painting developed in the proposed rules. The respondent stated that the Department should certify all purchasers who are authorized to buy Federal timber. This would include manufacturers, non-manufacturers and those who buy Federal timber from third parties.

Purchasers certified to purchase Federal timber would report all transactions, including transfer of private timber, to the agency within 10 days. A transfer agreement would be developed by the agency including the agency certification numbers for buyer and seller, estimated volume and a statement that all logs with yellow paint must be domestically produced.

All Federal logs would be painted on at least one end prior to leaving the sale area. All logs requiring domestic processing which are transferred to a third party would be painted on both ends with yellow paint prior to transfer. All logs transferred to a third party would be hammer branded with a mill brand prior to transfer. Waivers would be provided. The respondent states that

the key to the Act is to show that a person who purchased Federal timber has not sold private timber for export, and that anyone may purchase unmarked logs, but purchasers authorized to purchase Federal timber may not transfer unmarked logs for export. Therefore, there is no reason to identify the origin as long as logs are marked for domestic processing.

*Response.* The Department disagrees with this approach. First, while the Department can identify purchasers of Federal timber, it has no way of identifying persons who acquire Federal timber beyond the first purchaser. Therefore, a national certification of all persons who acquire Federal timber is not possible. Second, while it is true that a major component of the Act is that a person acquiring Federal timber has not transferred private timber for export, simply certifying that a person may acquire Federal timber is inadequate for enforcement of the Act. A person with a sourcing area may acquire Federal timber from within that sourcing area, and may transfer private timber for export outside of the sourcing area. Simply identifying the person is inadequate; the Department would need to establish where the timber originated to determine whether there had been a violation. The ability to purchase unmarked logs would render meaningless any tracking system. The Department would have no way of knowing whether a violation of the Act had occurred, based on either the transferor or the origin of the logs. Further, a person acquiring such logs also has no assurance that the transaction is legal. The Department has tried to make the tracking system as straightforward as possible while enabling the monitoring of the logs, as required by the Act. No change in the rule has been made in response to this comment.

*Comment.* One person stated that the amount of information that must be promptly reported by the buyer and seller of logs, coupled with the penalties for each violation of these requirements, make these requirements a substantial barrier to transferring logs to processors that can mill them to their highest and best use.

Another respondent commented that requiring that records be maintained for 3 years will create considerable additional storage requirements, and that there is no reason to collect the amount of information required in this section. This person said that only a signed statement stipulating that the logs must be domestically processed should be required.

*Response.* The Act requires the Secretary to draft any regulations necessary to implement the Act. The Department believes that the names of the log seller and the buyer, the log identification markings, the Federal agency contract number, and the volume of Federal logs included in the transaction is the minimum amount of information needed to monitor compliance with the Act. The log identification marks and contract number are necessary to determine origin of the logs and the original buyer. The volume is necessary to track logs, to determine the extent of an alleged violation and to help assess civil penalties. The retention of unprocessed log transfer transaction statements is necessary for the Department to monitor and assure compliance with log export and substitution restrictions. Without such records, the Department could not fulfill its responsibilities to implement and enforce the Act. Therefore, the Department declines to adopt these comments.

*Comment.* One person commented that because many log transfer agreements are made before actual volume measurements are performed, the Department must be willing to accept estimated log volumes rather than actual log volumes on the transfer form.

*Response.* The Department will accept volume estimates used in the actual transaction. If the transaction is based on standing tree (cruise) estimates, that will be the volume used for reporting the transaction. If the transaction is based on actual log scale volume, that is the volume to be reported. The phrase "estimated volume or actual volume if the transfer is based on log scale volume," has been added to paragraph (b)(1) in response to this comment.

*Comment.* One person commented that there is no justification for requiring either the transferrers or the transferees to certify that the information submitted is not confidential.

*Response.* The Department has revised this requirement. If a person signing the transfer form would like to keep something confidential, the person should mark the information. The Department will then evaluate the confidentiality of the information pursuant to the applicable laws. Therefore, the Department has modified the sentence on confidentiality in the form and in paragraph (b)(3)(ix) of proposed § 223.193.

*Comment.* One respondent stated that a person transferring unprocessed federal logs must certify that the person understands the Act and regulations

which can involve complex legal issues. Two respondents expressed concern that the rule requires persons to reach legal conclusions on issues where the law is unclear with regard to the log transfer documents and the annual reports, and complained that the administering agency is unwilling to give advisory opinions.

*Response.* While the Act, and therefore the regulations implementing the Act can be complex, a purchaser of unprocessed timber must understand these rules in order to abide by the law. No enforcement of the reporting requirements of the Act or these rules will occur until after this rule is published. The Forest Service is willing to meet with anyone to discuss the Act and/or the regulations when the regulations are finalized. However, the Department cannot give legal advice. No change in the rule is necessary.

A new paragraph, § 223.193(b)(3)(ii), has been added to clarify that the purchaser of Federal timber agrees to allow Federal officials access to log storage and processing facilities for the purpose of monitoring compliance with the Act and implementing regulations. This requirement clarifies that the Federal logs in possession of an indirect purchaser are subject to the same review as Federal logs acquired directly. Without access to log storage and processing facilities, the Department believes the Act's requirements to monitor indirect substitution and enforce its prohibitions would be severely hampered because of an inability to monitor log movement.

A new paragraph, § 223.193(b)(3)(iv), has been added to assure that indirect purchasers are aware the Act requires anyone who acquires federal timber to report the timber's receipt and disposition, 16 U.S.C. 620d(a)(1). Therefore, this paragraph references the required annual report.

Other than the changes noted, the Department has adopted several minor changes to the proposed text of this section for technical and editorial clarity which have no substantive effect.

#### *Section 223.194 Procedures for Reporting Acquisition and Disposition of Private Timber*

Under the Act, a person who sells or otherwise transfers private timber that requires domestic processing and has in the person's possession or subsequently acquires unprocessed Federal timber could be in violation of the prohibition against substitution if the buyer of the unprocessed private timber were to export it. To protect a person who deals in both unprocessed Federal and unprocessed private timber from such



substitution liability, proposed § 223.194 would require such a person to notify and receive an acknowledgment from the person acquiring the unprocessed private timber that such timber must be domestically processed, not exported, and would require that such transfers be reported to the Forest Service within 10 days of the transaction. The Forest Service would provide a form for such purpose. The statement on the proposed form would provide: (1) Notice to the person receiving the unprocessed private timber that exporting that timber would violate the regulations prohibiting substitution; (2) Notice to the person receiving the unprocessed private timber that the timber has been identified for domestic manufacturing by marking the logs with highway yellow paint that must be retained on the timber; (3) The acknowledgment of the notice by the recipient; (4) An agreement to include the statement in any subsequent transaction documents; (5) A signed copy of the transaction statement to be sent to the applicable Regional Forester within ten (10) calendar days of the transaction; and (6) An agreement to retain records of all transactions involving acquisition and disposition of unprocessed timber from Federal or private lands west of the 100th meridian in the contiguous 48 states for a period of three (3) years from the date of disposal by manufacturing or transfer.

*Comments.* This requirement drew 18 responses, most of which generally opposed the reporting requirements involving the acquisition and disposition of private timber, and specifically opposed the frequency requirements. These respondents said that their internal accounting and office practices made compliance within the 10 day time frame impossible. Other respondents said the reporting procedures were satisfactory.

*Response.* The Act specifically prohibits substitution of unprocessed Federal timber for export unprocessed private timber, and assigned the responsibility for monitoring compliance of these prohibitions to the Secretaries of Agriculture and the Interior. Reporting the acquisition and disposition of private timber, along with random site visits, are crucial to fulfilling this monitoring responsibility. The Department cannot enforce the Act's prohibition against substitution and the specific exceptions, without the ability to track unprocessed private timber. Therefore, the Department declines to adopt the suggestions that the proposed reporting of private timber transactions be removed from the rule.

As stated earlier, the Department believes that prompt reporting of transfers is vital to effective enforcement of the Act and believes that reporting such transfers within 10 calendar days is not excessively burdensome.

*Comment.* One respondent commented that the requirement to notify the person receiving unprocessed private timber that the timber has been identified for domestic processing by a spot of yellow paint that must be retained would be extremely expensive, and particularly difficult for small businesses.

*Response.* In order to enforce the Act's restrictions against direct and indirect substitution, it is necessary to mark all logs that must be domestically processed. Otherwise, there is no way to distinguish between private logs that may be exported, because there is no link to the acquisition of federal logs, and private logs that may not be exported because of the potential violation of substitution. The additional requirements, required by the Act's prohibitions, are the minimal means of identifying logs to be processed. No change in the rule has been made in response to this comment.

*Comment.* One person stated the rule should require persons who sell private timber from within their approved sourcing area to notify purchasers that they cannot export the logs under the Act.

*Response.* The rule's "Notice and Acknowledgment of Requirement to Domestically Process Timber Originating from Private Land" accomplishes this objective.

*Comment.* One respondent states that the rule should clarify that the transaction statements are not required from persons who trade in private timber that originates from outside a sourcing area.

*Response.* There are no requirements to complete such a statement for transactions involving unprocessed private timber from outside a person's approved sourcing area, because such timber does not require domestic processing. However, the Department agrees that this could be clarified. Therefore, paragraph (a) of § 223.194 has been amended to delete the language regarding private lands located within a sourcing area, and to add a new sentence at the end of the paragraph as follows: "Unprocessed timber originating from private lands located outside of a sourcing area may be transferred by the holder of the sourcing area, or by persons acquiring such unprocessed timber who are eligible to export such timber, without including such a statement."

Paragraph (a) of § 223.194 has also been amended to note that the reporting requirement applies to timber that requires domestic processing, including private timber originating within a sourcing area. This clarification is included to encompass all timber that requires domestic processing.

Paragraphs (b)(1) and (2) have been revised to include the required contents of the notice, including an agreement to permit authorized Federal officials access to private log storage and processing facilities in order to monitor compliance with the Act. As with monitoring of Federal log transfers, discussed earlier in this preamble, without permission to enter into private log storage and processing facilities of those persons in possession of private timber that requires domestic processing, the Department believes the indirect substitution prohibitions of the Act will be substantially unenforceable. This monitoring is a necessary component of enforcing the prohibition against substitution through the export of private timber that requires domestic processing, pursuant to § 223.189(a)(3).

Paragraph (b) has also been revised to include acknowledgments that the person transferring or acquiring the unprocessed private timber is: (1) Aware that failure to comply with the domestic manufacturing requirement for the unprocessed timber or failure to notify subsequent persons of these requirements is a violation of the Act, (2) understands that failure to completely and accurately report and identify unprocessed timber is a violation of the Act and the False Statements Act (18 U.S.C. 1001), and (3) the form has been read and understood. These acknowledgments are needed to assure that the certifier is aware of and understands the potential consequences of violating the Act. These changes assure that the requirements of the Act are enforceable.

Paragraph (b) has also been revised to remove the actual certification statements appearing on the form from the rule.

Further, the Department has clarified in new paragraph (c) that persons who fully comply with the notification requirement in this section are not liable for the actions of persons who subsequently acquire such timber in violation of the Act, except as otherwise provided by law.

The Department has adopted several minor changes to the proposed text of this section for technical and editorial clarity but which have no substantive effect.

*General Comments Relating to the Reporting Requirements of Both Sections 223.193 and 223.194*

*Comment.* Several respondents indicated the reporting requirements are too burdensome and costly. Some stated the burden is greatest on the smaller businesses that must commit substantial amounts of their limited time and resources to understanding and complying with these rules. Some stated that these requirements could eliminate some small businesses from continuing to purchase Federal logs. One respondent suggested that there be an annual notification by company, rather than a notification on each sale. One respondent said that it is impractical to require accounting by individual logs. Two respondents wrote that while these are new and added administrative procedures for the purchasers of Federal timber, the provisions appear reasonable and necessary to fulfill the intent of the legislation.

*Response.* As discussed previously, the annual reporting requirements of the Act do not differ significantly from what is presently being required in contracts awarded before August 20, 1990. The difference is that under the Act, persons who acquire National Forest System timber indirectly must submit an annual report. Previously only those persons who acquired unprocessed timber from National Forest System lands directly had to submit an annual report. In addition, the transfer reporting requirements under the Act are new. Contracts awarded before August 20, 1990 do not have this reporting requirement. Individual logs have never been requested to be identified in annual reports; reporting is done by volume.

The Act requires that a person notify the recipient about the Federal origin of the timber before a transfer occurs; an annual report would not meet this requirement. Completion of these transaction reports, which are on forms furnished by the Forest Service, takes from 5–20 minutes each to complete. The Department does not believe the new forms will have a major impact on timber purchasers, including small businesses.

The most time-consuming task is the annual report. However, most National Forest System timber purchasers have been providing similar information in the previous annual report since 1973.

The initial impact to all businesses will be the submitting of two different sets of forms: those for sales awarded before August 20, 1990, and those awarded on or after August 20, 1990.

The Department anticipates that at least 90 percent of the pre-enactment contracts will be completed and closed within three years of publication of this rule. The dual reporting burden will be steadily and substantially reduced over that period.

*Comment.* One respondent asked that the terms “transaction” and “transaction statement” be defined. Specifically, the respondent was concerned that a “transaction statement” not include log prices.

*Response.* The Department agrees. These terms are used in § 223.194 and have been defined in § 223.186 of this rule as follows: “*Transaction* means an arrangement involving the transfer of unprocessed timber. *Transaction statement* is a signed copy of one of the transaction reporting forms in 36 CFR 223.193 and 223.194.” The transaction statement does not require information regarding log prices.

*Comment.* One person was concerned that the forms are inappropriate for a corporation or partnership because they are written for the individual. The person suggested that the forms be revised to accommodate all types of businesses.

*Response.* The forms are drafted to accommodate the definition of a *person*, which includes the individual as well as corporations. Therefore, the suggestion is not adopted. The individual signing the form is responsible for the content in that person’s official capacity.

*Comment.* One respondent stated that maintaining records for three years is not necessary.

*Response.* The retention of acquisition and disposition records is necessary for the Department to monitor and ensure compliance with the prohibitions against export and substitution. Logs are often in commerce for several years. Without the availability of records, the Department could not fulfill its responsibilities to implement and enforce the Act on National Forest System lands by tracking the timber back to its source. The Act provides for the Secretary to draft such regulations as may be necessary to implement the Act.

Paragraphs (a)(5)(iv), (b)(2)(iv), and (b)(3)(I) of § 223.193 and paragraphs (b)(1)(iv) and (b)(2)(iv) of § 223.194 implement this requirement of the Act. Paragraphs (b)(1)(iv) and (b)(2)(iv) of § 223.194 have been revised to make them consistent with paragraphs (a)(5)(iv), (b)(2)(iv), and (b)(3)(I) of § 223.193, relating to the availability of records. The portion of paragraph (a) of § 223.194 that concerns the notification statement has been changed to paragraph (b), and has been revised to clarify that notification is necessary

only for timber that requires domestic processing. Some other minor changes have been made to the proposed text of this section for technical and editorial clarity but which will have no substantive effect.

*Section 223.195 Procedures for Identifying and Marking Timber*

Section 223.195 of the proposed rule would require marking and identifying of unprocessed logs originating from National Forest System lands located west of the 100th meridian in the 48 contiguous States. Proposed § 223.195 would require each unprocessed log originating from National Forest System lands west of the 100th meridian in the contiguous 48 states to be marked on each end with a spot of highway yellow paint and with a hammer brand approved for use by the Forest Supervisor of the National Forest from which the unprocessed log originates. In addition, if the unprocessed log is sold to a third party, proposed § 223.195 would require it to be tagged on one end with a bar-coded tag, which would identify the origin of the unprocessed log by timber sale contract number, region, national forest, ranger district, and log number.

As proposed, § 223.195 would permit only the Regional Foresters of Regions 1, 2, 3, and 4 to waive the requirements to hammer-brand on an individual sale basis if there is no history of logs from any origin being exported from the area of the purchaser’s operations if the purchaser is in compliance with these regulations, including the provision relating to transfer documents, and the purchaser has certified that he or she has not exported logs from that area in the last 24 months.

Proposed § 223.195 would reserve highway yellow paint for identifying logs originating from west of the 100th meridian in the contiguous 48 states that require domestic manufacturing.

*Comments.* This section drew 70 responses. Forty-four comments opposed the proposed use of bar code tags as burdensome, costly and unnecessary to implement the Act.

*Response.* In analyzing all comments and conducting surveys of National Forests and bar code tag manufacturers, the Department concludes that at this time bar coding would not be an effective or efficient way to track logs. Therefore, the bar coding requirements have been removed from the final rule. Likewise, these requirements have been removed from the reporting requirements in §§ 223.193 and 223.194. However, authorization is provided for the testing of alternative methods for possible future revision of this rule.

*Comments.* Twenty-four comments addressed the double-end hammer branding and yellow painting requirements for identifying National Forest logs. None supported this requirement, but several persons said they preferred hammer branding and painting to tagging logs with bar codes. Comments included the following points:

- Increased branding and painting makes the entire industry pay for the actions of a few bad characters.
- Some sales are so far removed from export yards that increased branding and painting are not necessary.
- Branding and painting requirements compromise safety, because they are manual work that must be done on the landing.
- The waiver provisions are unrealistic, too stringent, and not adjustable to local circumstances or conditions. Judgment as to requirements should be returned to the field.
- Painting and branding small and lower valued timber is problematic; flexibility regarding requirements should be made available in Regions 5 and 6, to accommodate conditions on the ground.
- Painting and branding should be required only on most logs and/or a minimum of 10 logs per load. Many logs larger than 10" or 12" should be branded on one end.
- Branding and painting on both ends conflicts with the utilization standards that require logs to be bucked at the break; this is impossible to do because the long is shattered.

*Response.* Following the reassessment of the use of bar coded tags, the Department believes that hammer branding and yellow painting are the best options currently available for identifying logs not available for export. The Department must be able to identify and track unprocessed Federal and private logs ineligible for export. To make tracking possible and to comply with the Act, all Federal and private logs required to be domestically processed must have long lasting and easily recognizable identifying marks which will stay on the logs until processed.

The Department acknowledges that some logs have more export value than others, and that it is difficult to get a legible brand on a small diameter log 100 percent of the time. With regard to the utilization standards, each end may need to be sawed in some instances. Consequently, the Department has rewritten proposed § 223.195 in the final rule to include paragraphs (e) and (f).

Paragraph (e) permits the Chief of the Forest Service to waive the painting requirements on National Forest logs and private logs when other identification methods that are equal or better than the yellow painting method are found. An easily identified marking indicating which logs must be domestically processed is essential for enforcement purposes. However, this waiver allows for developing technology.

Paragraph (f) amends the criteria by which the Regional Forester may waive all or a portion of the branding requirements in Regions 1, 2, 3 and 4. The Regional Forester remains the appropriate person to grant waivers. The Regional Forester has the broad perspective regarding exporting in the region. Given the Department's recent experiences with logs being transported great distances for commercial purposes, this broad perspective is essential to make the waiver determination. The proposed requirement that exporting not have occurred in the area of the purchaser's operations has been modified in the final rule. The requirement in the final rule is that exporting not have occurred in the previous five years in the purchaser's area of operations. While providing some time for logs to be in commerce, this modification also accounts for changed market conditions. However, to ensure effective enforcement of the Act, a new paragraph (iv) has been added to § 233.195(f)(1) to state that if the Regional Forester determines that exporting is or has been occurring within the person's area of operation within the previous 5 years, the Regional Forester shall revoke the waiver. Further, the certificate for Regions 1–4 states that the person not have exported in the area of operations in the past five years, to parallel the waiver requirement. In addition, the waiver is valid only for the person's area of operations. The Department believes it is helpful to provide flexibility to those purchasers whose logs would not have the opportunity to intermingle with export traffic. However, it is essential to monitor those logs that do leave the area of operations, and have a greater opportunity to intermingle with export traffic, in order to enforce the Act. Unmarked logs make enforcement of the Act's restrictions impossible, since their ability to be exported is not documented.

Paragraph (f) also allows for waiver of branding on one end on logs less than ten inches in diameter on the large end within Region 5 & 6 that will be processed at a specifically identified facility. The Department recognizes that

it may be difficult to brand a small log. One respondent suggested a waiver for logs less than eight inches in diameter on the large end. However, the Department is permitting waiver of one-end branding for logs less than ten inches on the large end, because there has not been significant demand for round wood of this size in the export market, so the chance of these logs mingling with exportable logs is low. However, paragraph (iv) states that if the Regional Forester determines that logs ten (10) inches or less in diameter inside bark on the large end are being exported in the Region, the Regional Forester shall revoke the waiver. This allows the agency to respond effectively to changed conditions. All waivers are granted on an individual timber sale basis.

The Department has also moved the waiver of painting requirements to paragraph (e), following the requirements to paint unprocessed timber originating from private lands in paragraph (d). This move clarifies that the waiver of painting requirements may apply to all unprocessed logs otherwise requiring yellow paint.

With regard to safety, logging is universally recognized as an inherently dangerous occupation. To minimize safety hazards to both private and Federal employees, logging contractors, landowners and managing agencies must work together to provide a reasonably safe working environment. Log accountability and identification must also be provided to assure that the government receives full payment for logs and that logs requiring domestic processing are not exported. No change in the rule is necessary; however, the Department is always interested in more efficient and effective methods for identifying and tracing logs to assure compliance with the Act.

*Comment.* One respondent commented that long logs are manually bucked, decked, and held for processing through a small sawmill or chip-and-saw. These logs are "in process," but the regulations do not recognize this situation. More flexible identification of in-process logs is necessary—or Regional Foresters need more funding and direction to monitor and enforce existing regulations. Another respondent stated that non-grade logs are often difficult to brand and paint, discouraging the use of small and highly defective logs because of cost.

*Response.* The proposed rule would require that if a log is cut into two or more pieces, each piece shall be identified in the same manner as the original piece. This provision was deemed necessary to assure that all Federal logs and other logs requiring

domestic processing are properly identified, even when such logs are remanufactured into shorter length segments, to prevent possible exporting.

However, the Department has concluded that in some situations it may be highly impractical, very costly and not necessarily in the Government's interest for a person to have available for use all branding hammers needed to replace brands assigned to logs of Federal origin that he or she may be acquiring from other persons. Consequently, paragraph (b)(1) permitting the use of yard catch brands has been added to § 223.195 of the final rule as follows: "A generic log hammer brand, known as a 'catch brand', used to identify ownership, may be used to replace lost, removed, unreadable or otherwise missing brands where such use is authorized by the Regional Forester and approved by the Contracting Officer. Use of such a catch brand on a log or log segment will signify Federal origin."

Further, the Department recognizes that sometimes such re-branding may not be appropriate or necessary, particularly where such pieces are being immediately processed, and/or final processing is to continue on-site, within a relatively short period of time. Accordingly, the Department has added the following to paragraph (b)(2) of § 223.195: "The requirement to preserve identification of log pieces shall not apply to logs cut into two or more segments as part of the mill in-feed process immediately before processing. Log segments that are returned to or placed in storage must be marked on both ends with yellow paint."

With regard to non-grade logs that may be difficult to brand and paint, the Department has provided a waiver of branding on one end for logs 10" or less, assuming they are not being exported in the Region. The Department believes that the waiver addresses this respondent's concern.

*Comment.* One respondent objected to the waiver in a person's area of operations. The respondent stated that his company had many areas of operations, and one area should not be affected by another.

*Response.* The area of operations that will be considered is within the Region where the waiver will occur. Otherwise, the Regional Forester could not grant a waiver. A smaller area would lose meaning in terms of identifying transport of logs for export. No change to the rule is necessary in response to this comment.

*Comment.* The same respondent said that the criterion in the proposed rule at 36 CFR 223.195(c)(4)(ii), now in

paragraph (f)(1)(ii) of the final rule, that persons must certify that they have not exported unprocessed timber from private lands west of the 100th meridian in the contiguous 48 States in the previous 24 months means that those with statutory exemptions from substitution in other circumstances (sourcing areas) could not receive a waiver.

*Response.* The waiver of branding would have to be evaluated along with any exemptions from substitution to which a person is subject. However, even if exporting is allowed in the same area that Federal timber may be purchased, for instance, under the indirect substitution exemption in § 223.203, this would not affect branding requirements. The Department would need to monitor the flow of logs especially carefully in this situation, to insure that the intermingling of exportable and non-exportable logs does not occur. No change in the rule is necessary in response to this comment.

*Comment.* One respondent stated that the waiver provision is too limited to be useful, because it requires no history of logs from any origin being exported from the area. This respondent felt that few waivers will be implemented because Region 1 logs have been exported, and other Regions will be reluctant to grant waivers.

*Response.* The Department believes the revision of the waiver provisions in the final rule discussed above adequately addresses this comment. The revised waiver procedures give the Regional Foresters the ability to address unique local conditions.

*Comment.* One respondent stated that the annual requirement to certify that a Federal timber purchaser has not exported would suffice for the certification in the waiver of branding requirements.

*Response.* The Department believes that a separate certification for the particular purpose of waiving branding in a specific area is less confusing, since the purposes of each form are different.

*Comment.* One respondent suggested that notification of log sales between companies within a Region be reported to the Federal government in lieu of the marking and certification requirements. Only logs leaving a region would be required to be marked.

*Response.* In order to monitor export activity effectively, logs must be identified. A notification will not assist in identifying logs. Consistent and accurate tracking of these portable, fungible products requires individual log identification.

Analysis of these comments revealed that the proposed rule failed to state

when such identifying marks should be applied to the logs. With regard to National Forest System logs, the product identification provision, C(T)6.82, in the timber sale contract requires that painting and branding of products be done before removal from the sale area. This has been a long-standing requirement and practice. Therefore, the Department has added this requirement to paragraph (c) of the final rule to avoid any possible confusion as to when the identifying marks are to be applied to logs originating from National Forest System lands.

With regard to private logs requiring domestic manufacturing, they must be marked before removal from the harvest area. If private logs are acquired by a person who may not export such logs, the logs must be marked by the person acquiring the logs at the time of the acquisition. This requirement has been added to paragraph (d) of the final rule.

*Comment.* One person stated that an estimated additional cost of \$1.00 per thousand board feet will be incurred to comply with the new regulations requiring the painting of private and Federal logs and that these requirements appeared to not recognize the principle of cost/benefit ratios.

*Response.* The Department recognizes that some companies will incur additional costs by complying with these marking requirements. However, with the exception of the requirement to paint private logs, very similar branding and painting requirements have been required of National Forest timber sale purchasers in most areas of Regions 5 and 6 for at least 20 years, and more recently in Region 1. The Department believes the additional cost of properly identifying logs requiring domestic manufacturing in areas where branding and painting has not been extensively utilized in the past is necessary for effective implementation of the Act.

*Comment.* One respondent stated that adding yellow paint to private logs could cause confusion, because Federal and private loads could not be readily distinguished from a distance.

*Response.* The purpose of the yellow paint is to identify the log as requiring domestic processing, not to identify ownership or origin. Loads of National Forest, Bureau of Land Management, State Forest, and some private logs in Oregon and Washington currently carry yellow paint marks. Log identification is maintained by the log brands and truckload receipts displayed on each respective load. Therefore, the Department believes that the yellow paint does not cause confusion, and that no revision of the rule is warranted.

*Comment.* One respondent was concerned with the requirement that each unprocessed log shall be marked on each end with a spot of yellow paint and with a hammer brand approved for use.

*Response.* The Department expects timber sale administrators to administer contract requirements in a firm and reasonable manner to assure compliance with the objectives and provisions of the Act and these regulations. This rule provides for waivers of the requirements in some circumstances.

*Comment.* One respondent stated that the Department should waive the bar code tagging and highway yellow paint requirements on private timber for any purchaser who doesn't export logs.

*Response.* The requirement to use bar coding has been removed in the final rule. The export of private timber which has been identified as requiring domestic processing is a substitution violation. Only private timber that requires domestic processing must be painted. The yellow paint markings are essential to monitor compliance with the prohibitions against substitution. However, the Department has adopted a limited waiver of painting requirements where special conditions warrant, pursuant to § 223.195(e) of the final rule.

*Comment.* One reviewer stated a need for quick release of log brands for reuse.

*Response.* The proposed rule would require a 24-month waiting period before release of an assigned log brand to ensure that all logs harvested under the assigned brand had been domestically manufactured. The 24-month period guards against substitution violations. The Department recognizes that in those States that require registered log brands, many companies will have to develop and register additional log brands to meet this requirement. The Forest Service will strive to release brands for re-assignment as soon as possible following the 24-month period. No revision of the rule is necessary.

The Department has made several minor changes to the text of this section as proposed for technical and editorial clarity, but which have no substantive effect.

#### **Section 223.196 Civil Penalties for Violation**

Section 492(c) of the Act establishes civil penalties for violation of the Act of not more than \$500,000 for each violation or three times the gross value of the unprocessed timber involved for a violator who exported or caused to be exported unprocessed Federal timber; not more than \$500,000 for a violator

who willfully violates any provision of the Act or any regulation issued under the Act; not more than \$75,000 for each violator who commits a violation in disregard of such provisions and/or regulations; and not more than \$50,000 for each violation by a violator who should have known that the action constituted a violation of such provisions and regulations.

The last three penalties may be assessed regardless of whether a violation caused the actual export of unprocessed Federal timber. The Act also provides that a penalty assessed under the Act shall not exclude any other penalty provided by law and shall be subject to review in an appropriate United States district court.

The proposed rule at § 223.196 merely repeats the language of the Act.

This section drew four comments.

*Comment:* Some respondents felt that 100 percent compliance with the branding, painting, log tagging, bar coding, and inventory requirements is impossible. They thought that minor instances of an illegible brand, or a missed log brand or paint should be handled in relation to the infraction. These respondents felt the final rule must be flexible and attainable so that responsible and prudent purchasers can operate without facing civil penalties. In the view of these respondents, current log accountability requirements adequately meet the Act's enforcement objectives. Another respondent said that the Forest Service should list priorities for enforcement.

*Response:* The Department recognizes that the law and these rules must be administered with prudence and good judgment. The Act imposes strict fines on violations of "any provision" of the Act or regulations implementing the Act. The Act also states that the Secretary *may* assess fines based "on the record and after an opportunity for a hearing." Therefore the Act ensures that those persons accused of violations will have a full and fair opportunity to present their views and that the actual assessment of penalties is discretionary. The Department believes that the regulations as written reflect the Act. The Department expects all timber sale purchasers and other persons acquiring unprocessed Federal timber to comply with the log identification requirements contained in this rule. The Forest Service will enforce the Act and these regulations as written, and will consider infractions on a case-by-case basis. The Department disagrees that current log accountability requirements are adequate and declines to adopt this comment.

*Comment.* One person stated that the penalties for non-willful offenses are excessive, and another person stated that the "stiff penalties for lost or damaged tags are unreasonable."

*Response:* The Department has no authority to change the penalties stipulated in the Act. However, Congress established maximum penalties ("not more than"), but not minimum penalties. The severity of the penalty to be assessed in each case will be based on the severity of the offense. Bar code tags are not required in the final rule. No change in the rule as proposed is necessary to respond to this comment.

*Comment.* One person suggested making the penalty for exporting Federal timber severe enough to deter violations of the Act.

*Response.* Congress authorized the Secretary to assess civil penalties of up to \$500,000 for each violation, and to debar and cancel contracts in order to deter illegal exports or substitution activities. Moreover, the penalties provided by the Act do not exclude any other penalty provided by law. The Department has no statutory authority to establish penalties beyond those specified by law. Therefore, this comment cannot be adopted.

#### **Section 223.197 Civil Penalty Assessment Procedures**

Section 492(c) of the Act (16 U.S.C. 620d(c)) provides that if the Secretary of Agriculture finds, on the record and after an opportunity for a hearing, that a person has violated the Act or its regulations, he or she may impose certain civil penalties for such violation(s). For purposes of assessing these penalties, the Department has added the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) to the list of statutes governed by the adjudicatory procedures at 7 CFR 1.130, *et seq.* in a separate, final rulemaking document (56 FR 22105, May 14, 1991).

*Comment.* Two persons commented that, as determined in "*Tall v. United States*", factual determinations can be made only by a jury, not simply on an administrative record.

*Response:* The Administration Procedure Act (APA), under 5 U.S.C. 554, governs formal adjudication if a statute requires a determination to be made, "on the record after opportunity for an agency hearing \* \* \*." The Act requires the Secretary to assess certain penalties if he/she finds, "on the record and after an opportunity for a hearing" that a person meets the elements of the various penalties (16 U.S.C. 620d(c)(1)).

While section 554 exempts an adjudication from the formal administrative adjudication process if a matter is subject to a subsequent trial of the law and the facts de novo in a court (5 U.S.C. 554(1)), this exception is not found in the Act. On the contrary, the Act states that an administrative penalty shall be, "subject to review in an appropriate United States district court" (16 U.S.C. 620d(c)(3)). In other words, adjudication of civil penalties may occur in an ordinary formal administrative process, with record review in district court. None of the research data bases revealed a case entitled "*Tall v. United States*" dealing with this issue.

#### *Section 223.198 Administrative Remedies for Violation*

Section 492(d)(2) of the Act provides that, in addition to the provision for debarment in subpart C of this part, the head of the appropriate Federal department or agency also may cancel any contract entered into with a person found to have violated the Act or regulations or contracts issued under the Act.

The proposed rule would clarify that such a finding shall constitute a serious violation of contract terms pursuant to § 223.116(a)(1) regarding cancellation of contracts.

Three persons responded to this section.

*Comment.* These persons suggest that no adverse action should be taken against a timber purchaser before expiration of all appeal rights on debarment proceedings. To do otherwise would violate substantive and procedural due process protections.

*Response.* To protect the public's interest the Department will continue to suspend timber sale operations as soon as improprieties are determined. This is consistent with current procedure under existing regulations. The procedures applicable to the debarment of persons violating the Act, or any regulation or contract issued under the Act are not applicable to existing contracts which are under consideration for cancellation. The debarment procedures apply to future timber sales and future acquisitions of Federal timber. Any debarment action will be taken consistent with the Act and the regulation issues pursuant to the Act. No change in the rule as proposed is necessary to address this comment.

*Comment.* One respondent suggested that contracting officers be given appropriate guidance on which violations justify the drastic remedy of contract cancellation, including direction on considering whether the

violation was intentional, produced significant financial benefits to the perpetrator, etc. Another respondent said that the authority to cancel contracts should not be delegable.

*Response.* Adequate checks and balances currently exist. Having been given broad powers under the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*), contracting officers are still required to draw counsel and advice from Forest Service law enforcement specialists to determine criminal intent, the Regional Forester's and Chief's contracting specialists, the Department's Office of the General Counsel (OGC), and in some cases the Department of Justice's U.S. Attorney's Office before deciding which violations justify contract cancellation. No additional direction in this final rule is necessary.

#### *Section 223.199 Procedures for Cooperation with Other Agencies*

Section 495 of the Act (16 U.S.C. 620f) states that the Secretaries of Agriculture and Interior shall, in consultation, each prescribe new, coordinated, and consistent regulations to implement this title on lands which they administer. Subsection 491(d)(2) of the Act (16 U.S.C. 602c(d)(2)) authorizes the States to cooperate with Federal and State Agencies with appropriate jurisdiction to further the intent of this title. The Act also requires the Secretary of Commerce to issue certain orders and promulgate rules and guidelines necessary to carry out this title.

State and Federal government agencies clearly have individual responsibilities under the Act. Cooperation among these agencies in monitoring and enforcing these regulations provides the most efficient use of limited personnel and financial resources. Cooperative Agreements and/or Memoranda of Understanding between governmental agencies are common in similar situations where there are common responsibilities and interests.

Cooperative efforts to enforce this Act might include exchanging information on sourcing area applications, sourcing area approvals or disapprovals, log brands being used, logging activity, and proposed timber sales. Agencies may cooperate on monitoring export facilities or log storage areas so that each agency would not be required to make separate visits. This cooperative effort would also reduce the impact on the operators of the export facilities and storage areas.

The Department has consulted with and discussed cooperative agreements with the Bureau of Land Management, the Department of Defense and other

agencies managing public timber resources in the development of the rule as proposed.

*Comment.* One person commented that neither the preamble nor the proposed regulations mentions any consultation or any effort to be coordinated and consistent at the national level.

*Response.* Cooperative agreements and Memoranda of Understanding with other public agencies may be developed at the National Forest, Regional or National Office levels, depending on the program impacts and range of interest. National manuals and handbooks provide direction and guidelines for drafting assistance and consulting with higher-level officials and the Department's Office of General Counsel before entering into such agreements. No further direction is necessary in this final rule.

#### *Section 223.200 Determination of Surplus Species*

Section 489(b) of the Act (16 U.S.C. 620a(b)) and the proposed rule would require that determinations that specific quantities of grades and species are surplus to domestic manufacturing needs must be made in accordance with Title 5, United States Code, section 553, the rule making section of the Administrative Procedure Act. The proposed rule also would require that withdrawals of such determinations be done in accordance with the same procedure. Section 491(h) of the Act (16 U.S.C. 620c) requires withdrawals of such determinations to be done "by rule."

The proposed rule would require that review of a determination that a quantity of grade or species is surplus must be reviewed at least once every three (3) years. Notice of the review will be published in the **Federal Register**. The public will have at least 30 days to comment on the review.

The proposed rule specifically requested comments on the current determinations that Alaska yellow cedar and Port Orford cedar supplies are surplus to domestic manufacturing needs. These comments will be used to develop a separate rule making on surplus species determinations. The proposed rule repeated the interim rule which continued the surplus designation of these two species until hearings could be held, in order to avoid the disruption that could be caused by suddenly discontinuing their present surplus status.

Fourteen responses were received on this section. Most of these addressed whether Port Orford cedar should be classified as being surplus to domestic

manufacturing needs. Other species discussed and/or proposed for surplus consideration were Alaskan yellow cedar, Western juniper, Rocky Mountain juniper and Pacific yew.

*Comment.* Six respondents stated that there is a strong domestic demand for Port Orford cedar, and urged that Port Orford cedar no longer be exported in log form. Five other respondents stated Port Orford cedar is still surplus to domestic manufacturing needs, and that if the species were to be declared non-surplus it would disrupt employment and adversely affect the local communities where it is grown and harvested.

*Response.* The Department is considering these comments in its development of the proposed rule on surplus species.

*Comment.* One respondent stated that hearings could pose problems for small manufacturers, who might be "disciplined" by larger companies for opposing the export of Port Orford Cedar.

*Response.* The Act requires a "hearing" on the issue of surplus species. Hearings will be conducted via the rule making process. Comments may be submitted anonymously in response to the proposed rule on surplus species when it is published.

*Comment.* Comments regarding other species were as follows:

One person stated that Alaska yellow cedar is not surplus to domestic manufacturing needs, and that a hearing would find mills willing to purchase and process the species should it be prohibited from export. Another party stated that Alaska yellow cedar is surplus.

One person responded that Western/Rocky Mountain/Utah juniper should be made a surplus species. This respondent and another respondent suggested also that Pacific yew should also be declared surplus and permitted to be exported because there is little if any domestic use for this species.

*Response.* Again, these comments will be analyzed in the development of the proposed determination of the surplus species regulation. All interested parties should be prepared to submit comments regarding this proposed determination during the comment period provided in the **Federal Register** publication.

*Comment.* Two persons commented that the proposed procedures in the rule for determining surplus species appear adequate, and another party commented that the entire set of regulations should be finalized before determining if Port Orford cedar or Alaska yellow cedar supplies exceed domestic manufacturing needs.

*Response.* The Department agrees with these comments. No revision of the rule is necessary. Some minor changes to the text of this section as proposed have been made for technical and editorial clarity, but have no substantive effect.

#### *Section 223.201 Limitations on Timber Harvested in Alaska*

Section 223.161 of the current regulations is repeated, with minor editing, in this Subpart to consolidate all export and substitution restriction rules applicable to all States located west of the 100th meridian. The repetition was needed to make clear that the provision regarding Alaska applies to contracts entered into before, during, and after the date of enactment of the Act.

No comments were received on this section. Therefore, the Department adopts this section, with only minor editing.

#### *Section 223.202 Information Requirements*

This rule imposes additional information collection requirements in the form of applications, certifications, reports and record keeping requiring clearance from OMB for compliance with the Paperwork Reduction Act. In the proposed rule, this section provided estimates of the time needed to collect this information, and provided addresses to send comments on these estimates.

The comments submitted concerning the information collection requirements relating to the proposed annual report and the transaction notices are discussed in the Department's responses to comments received on §§ 223.193 and 223.194.

*Comment.* Several respondents stated that there will be a significant, additional paperwork burden on private companies.

*Response.* Section 492 of the Act (16 U.S.C. 620d) specifically requires that log transactions be reported. The implementing regulations require the minimum burdens necessary for enforcement of this and other provisions of the Act. The Department has worked to lessen the paperwork burden in this final rule.

#### *Section 223.203 Indirect Substitution Exception for National Forest System Timber From Within Washington State*

Section 223.203 was included in the final rule published in the **Federal Register** on December 19, 1991 (56 FR 65834). Section 223.203 is included in this rule making for continuity and to avoid confusion as to its status. The

names of the persons obtaining a share of the Washington State quota of unprocessed Federal timber that is exempt from the prohibition against substitution, and the amount of the share for each person, are identified in a new paragraph (e) of § 223.203. The Act requires that the names of persons obtaining such shares and the amount of the shares be established "by rule." 16 U.S.C. 620b(b)(2)(A).

Otherwise, the Department has made minor changes to the text for technical and editorial clarity, including the removal of paragraph (a) in its entirety as redundant and unnecessary. The prohibition against indirect substitution discussed in this paragraph is covered in § 223.189 of this subpart. The remaining paragraphs in this section have been correspondingly re-coded to reflect the deletion in this rule making. These changes have no substantive effect.

#### **General Comments**

Several comments that did not fit into any of the above regulatory sections are addressed here.

*Comment.* One respondent expressed the belief that face-to-face communications between potentially affected timber industry companies and the Federal land management agencies are critical in the development of any regulation.

*Response.* Publishing through the **Federal Register** and receiving public comments was the most efficient and cost effective method available to develop these rules. The Forest Service plans to conduct several informational meetings nationwide after the final regulations go into effect. This will give interested persons an opportunity to gain a better understanding of the rules and how they will be applied.

*Comment.* One respondent thought that assumptions made in the National Forest Management Plans on local timber demand will be outdated because exporting firms will gain additional access to certain Federal timber through sourcing areas, and that some forest plans may have to be amended to reflect this change in timber demand.

For example, increased demand might prompt the Forest Service to increase the annual allowable sale quantity in a particular forest plan. However, such an increase could significantly affect the environmental quality of the forest. Direct or indirect environmental impacts may result from the proposed rule, and such impacts should be analyzed in a review in compliance with the National Environmental Policy Act (NEPA).



Another respondent expressed concern for the lack of any environmental review associated with the rule. The respondent stated that the rule permits previously ineligible persons to buy Federal timber. The respondent stated that could change the timber demand which might cause the Forest Service to increase the allowable sale quantity in a particular forest plan. The respondent concluded that such an increase might have substantial environmental ramifications on the affected forest, and therefore an environmental review is necessary.

*Response.* The Department has conducted an environmental assessment and made a Finding of No Significant Impact (see information under "Environmental Impact", below). The existing rules at 36 CFR 223.160 are less restrictive as to who may buy Federal timber than the Act and these implementing regulations. The existing rules require only that a company not export private timber from within an area tributary to its domestic processing plant if that person also purchased Federal timber directly from a Federal agency to supply that plant. If the company had an established "historic quota" that company could purchase Federal timber and export private timber from within its tributary area if neither its historic purchase quota nor its historic export quota were exceeded in any calendar year.

However, the existing rules did not restrict indirect substitution, so when a company reached its historic export or purchase quota, it could continue to acquire from a third party all the federal timber it wanted from within its tributary area for its plant.

Moreover, a company's tributary area was not subject to approval by the Department. The tributary area was simply the geographic area from which unprocessed timber was delivered to a processing facility and was not subject to a formal review and approval process. The tributary area changed with the circumstances.

This Act eliminates historic quotas, and prohibits companies from exporting private timber from within an approved sourcing area, or from west of the 100th meridian in the contiguous 48 States if the company has no approved sourcing area, and prohibits indirect substitution. Instead of the tributary areas under the old rule, the Act requires sourcing areas to be formally approved by the Secretary—and those sourcing areas can be changed only upon review and agreement of the Department. This Act imposes far more restrictive conditions in order for exporting companies to

acquire federal timber than under the pre-enactment rules.

Further, any proposed change in the allowable sale quantity on a forest would be subject to an environmental review at the time of the proposal.

All aspects of forest plans are subject to monitoring and periodic reviews, including the allowable sale quantity (ASQ). All reviews shall consider the Standards and Guidelines from which the specific plan was developed, plus any modifications, and shall be conducted within NEPA guidelines. This regulation proposed only to limit the persons eligible to purchase National Forest timber. The regulation does not affect the quantity or quality of timber to be sold, where the sales are located (other than west of the 100th meridian in the contiguous 48 States), the contract period, or operating seasons. The Department disagrees that this rule may cause an increase in demand for National Forest System timber.

*Comment.* One respondent stated that log exporting problems should be regulated at the docks where the ships are loaded by stopping all log exports, not by burdening private companies with excessive log identification and reporting regulations.

*Response.* The Act requires monitoring at the time of acquisition. The Act does not prohibit export of all logs, but of Federal logs and some private logs. Given this divergent treatment of a fungible commodity, it is necessary to regulate the logs in transit, as well as on the export docks.

*Comment.* Several respondents said that the regulations will have adverse effects on competition and employment, as mill owners will not be competitive in bidding for private timber, and that the annual effect of the regulation will be over \$100 million.

*Response.* While the Act does monitor commerce, it also preserves processing jobs and natural resources domestically. The regulations implement these objectives through monitoring and enforcement mechanisms.

*Comment.* Several respondents commented that the proposed rule imposes significant new requirements on small business timber sale purchasers and other entities.

*Response.* The proposed rule in and of itself does not impose significant new requirements. The Act places certain requirements on persons engaged in acquiring unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States and exporting unprocessed private timber originating from private lands. The Act also requires the

Secretary of Agriculture to implement the requirements of the Act through this rule making. The final rule simply implements the provisions of the Act. Further, the Department has modified the rule in order to further minimize the burdens on timber purchasers while still enabling enforcement of the Act.

#### **Amendment to 36 CFR Part 261—Prohibitions**

Part 261—Prohibitions would be amended to include 16 U.S.C. 620(f) as part of the authority citation.

#### **Section 261.6 Timber and Other Forest Products**

The proposed rule would add paragraph (i) to § 261.6 making a violation of the Act, or its implementing regulations, subject to penalties under Part 261. Subsections 492(c) (1) and (2) and Subsection 492(d) of the Act specifically provide for civil penalties and administrative remedies for violations of the Act that are included in another section of the proposed rule. Subsection 492(c)(3) of the Act states that the penalties provided under § 492(c) do not exclude any other penalty provided by law. Proposed § 261.6(i) is such a penalty. Inclusion of violations under §§ 223.185 through 223.202 in § 261.6(i) is essential for consistent and complete implementation of the Act. The prohibition at § 261.6(g) regarding the current export regulations existing at subpart D would be retained to continue enforcement of regulations governing timber sale contracts issued prior to enactment and publication of this final rule.

*Comment.* One said that the Act did not authorize criminal penalties, nor are they necessary in light of the serious civil and administrative sanctions.

*Response.* Criminal sanctions are authorized by the Organic Act, 16 U.S.C. 551, and by 18 U.S.C. 3559(a)(7) and 18 U.S.C. 3571(b)(6). These sanctions applied to export violations before enactment of the Act, and are another tool for enforcement. Consequently, it is not necessary to change this section.

#### **Summary**

Having fully considered the relevant comments received on the proposed rule, the Department is adopting this final rule, with the modifications previously described in response to comments received. This rule supersedes those provisions of the interim rule published in the **Federal Register** on November 20, 1990. Together with the rule of December 19, 1991, (56 FR 65834) this rule comprises the implementing regulations for the

Forest Resources Conservation and Shortage Relief Act of 1990 except for the separate rule making to be done on surplus species.

This rule is effective upon publication. This rule making relates to agency management, public property and contracts, and therefore pursuant to the Administrative Procedure Act (5 U.S.C. 553(a)(2)), is exempt from the 30-day delay between publication of a rule and its effective date. Further, a delayed effective date is not required if a rule is a substantive rule which grants or recognizes an exemption (5 U.S.C. 553(d)(1)). This rule provides certain exemptions from the restrictions on substitution, and therefore may be effective immediately. In addition, a delayed effective date is not required if good cause is found and published with the rule (5 U.S.C. 553(d)(3)). Good cause exists to make this rule making effective upon publication due to the many deadlines in the Act for monitoring and enforcement of the Act.

#### **Environmental Impact**

Based on both experience and environmental analysis, this final rule will have no significant effect on the quality of the human environment, individually or cumulatively, and the Forest Service has made a Finding of No Significant Impact (40 CFR 1508.27). This rule only establishes certain administrative procedures to limit the persons qualified to purchase unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States. It does not affect the amount of timber to be sold, where the sales will be located, when they will be operated, the contract period, the contract size, resource protection requirements, or any aspect of on-the-ground contract performance. This rule does not alter the requirement that each timber sale must be analyzed and documented in compliance with the National Environmental Policy Act and its implementing regulations. Copies of the Environmental Assessment and Finding of No Significant Impact may be obtained by writing or calling the person or office listed earlier in this document under **FOR FURTHER INFORMATION CONTACT**.

#### **Controlling Paperwork Burdens on the Public**

Because of the previous publication of portions of this comprehensive rule making, some sections of this rule making already have OMB control numbers. Previously approved OMB Control Numbers 0596-0114, 0596-0115, and 0596-0021, as well as new information collection requirements, are

being consolidated under OMB Control Number 0596-0114.

The procedures in §§ 223.189 and 223.192, and some of the procedures in § 223.190 were approved by the Office of Management and Budget (OMB) and assigned Control Number 0596-0114 upon issuance of the interim rule. Control Number 0596-0114 has been reapproved by OMB for use through May 31, 1997. OMB approved the information collection requirements in §§ 223.191 and 223.203 for use through August 31, 1995, and assigned them Control Number 0596-0115. OMB approved the information collection requirements in § 223.48 and § 223.87 for use through May 31, 1997 and assigned them Control Number 0596-0021; the information collection requirements in § 223.48 and § 223.87 have been revised.

The application and reporting procedures in §§ 223.187, 223.193, 223.194, 223.195, and some of the procedures in § 223.190 of this final rule contain new record keeping and reporting requirements as defined in 5 CFR part 1320 and, therefore, impose additional paperwork burdens on the affected public. The Office of Management and Budget (OMB) has approved these requirements, and assigned them Control Number 0596-0114.

#### **Unfunded Mandates Reform**

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, which the President signed in law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of \$100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

#### **Regulatory Impact**

This final rule was reviewed under USDA procedures and determined to be a significant rule under Executive Order 12866 on Regulatory Planning and Review because of the strong public interest expressed in the proposed rule. Accordingly, this final rule was subject to OMB review.

This rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and it has been determined that the action will not have a significant economic impact on a substantial number of small entities as defined by that Act. Economic impacts associated with implementation of this rule result directly from the Forest Resources Conservation and Shortage

Relief Act, and not from the rule itself. The rule imposes no additional requirements on small business timber sale purchasers or other small entities beyond what is required by the Forest Resources Conservation and Shortage Relief Act of 1990.

This rule has been reviewed in accordance with the principles and criteria contained in Executive Order 12630 and it has been determined that the rule does not pose the risk of a taking of constitutionally protected private property.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under this rule: (1) All state and local laws and regulations are in conflict with this rule or which could impede its full implementation will be preempted; (2) no retroactive effect will be given to this rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

#### **List of Subjects**

##### **36 CFR Part 223**

Exports, Government contracts, National Forests, Reporting requirements, and Timber sales.

##### **36 CFR Part 261**

Crime, Law enforcement, and National Forests.

Therefore, for the reasons set forth in the preamble, part 223 and part 261 of Title 36 of the Code of Federal Regulations are amended as follows:

#### **PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER**

1. The authority citation for part 223 is revised to read as follows:

**Authority:** 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, 104 Stat. 714-726, 16 U.S.C. 620-620j, unless otherwise noted.

#### **Subpart B—Timber Sale Contracts**

2. Revise § 223.87 to read as follows:

##### **§ 223.87 Requirements of bidders concerning exports.**

In order to have a bid considered responsive for a sale of timber from National Forest System lands, each bidder must certify that the bidder is eligible to purchase timber from National Forest System lands consistent with the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) and its implementing regulations at 36 CFR part 223, and that the bidder's timber purchase and export activities are in compliance with the timber export and substitution provisions of the Forest Resources Conservation and Shortage

Relief Act of 1990 (16 U.S.C. 620, *et seq.*) and its implementing regulations at 36 CFR part 223.

### Subpart C—Suspension and Debarment of Timber Purchasers

3. Revise paragraph (a) of § 223.130 to read as follows:

#### § 223.130 Scope.

(a) This subpart prescribes policies and procedures governing the debarment and suspension of purchasers of National Forest System timber. This subpart further prescribes policies and procedures governing those persons who violate the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*).

\* \* \* \* \*

4. Revise § 223.131 to read as follows:

#### § 223.131 Applicability.

These regulations apply to purchasers of National Forest System timber as well as to those persons who violate the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*). These regulations do not apply to Forest Service procurement contracts which are governed by regulations at 41 CFR 4–1.6.

5. Amend § 223.133 by revising the definitions of *Affiliates*, *Debarment*, and *Purchaser* and by adding in alphabetical order definitions of *Federal lands* and *Person* to read as follows:

#### § 223.133 Definitions.

\* \* \* \* \*

*Affiliates* are business concerns or persons, whose relationship entails the following:

(a) either party directly or indirectly controls or has the power to control the other; or

(b) a third party directly or indirectly controls or has the power to control both. In determining whether affiliation exists, the Forest Service shall consider all appropriate factors, including, but not limited to, common ownership, common management, common facilities, and contractual relationships. Further guidelines to be used in determining affiliation are found in the Small Business Administration regulation in 13 CFR 121.401.

\* \* \* \* \*

*Debarment* means action taken by a debarring official under §§ 223.136 through 223.140 to exclude a purchaser from Forest Service timber sale contracts for a reasonable, specified period of time. A purchaser so excluded is “debarred.” Debarment pursuant to the Forest Resources Conservation and

Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) means action taken by a debarring official under §§ 223.136–223.140 to exclude persons from entering into any contract for the purchase of unprocessed timber originating from Federal lands and from taking delivery of unprocessed Federal timber purchased by another party for the period of debarment.

\* \* \* \* \*

*Federal lands* means, for the purposes of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), lands that are owned by the United States, but does not include any lands the title to which is:

(a) Held in trust by the United States for the benefit of any Indian tribe or individual,

(b) Held by any Indian tribe or individual subject to a restriction by the United States against alienation, or

(c) Held by any Native Corporation as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

\* \* \* \* \*

*Person* means any individual, partnership, corporation, association, or other legal entity, and includes any subsidiary, subcontractor, parent company, and business affiliates.

\* \* \* \* \*

*Purchaser* means any person, who:

(a) Submits bids for, is awarded, or reasonably may be expected to submit bids for or be awarded, a Forest Service timber sale contract;

(b) Conducts business with the Forest Service as an agent or representative of another timber sale purchaser; or

(c) For the purposes of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act), any person who violates the Act or any regulation or contract issued under the Act, or any person who may reasonably be expected to enter into a contract to purchase or receive delivery of unprocessed Federal timber in violation of the Act or its implementing regulations.

\* \* \* \* \*

6. Revise § 223.135 to read as follows:

#### § 223.135 Effect of listing.

(a) Except as otherwise provided in paragraph (b) of this section, purchasers debarred or suspended in accordance with this subpart shall be excluded from bidding on or award of Forest Service timber sale contracts. The Forest Service shall not knowingly solicit or consider bids from, award contracts to, approve a third party agreement with, or renew or otherwise extend, except pursuant to the terms of a contract term adjustment,

an existing timber sale contract with these purchasers, unless the Chief of the Forest Service or authorized representative determines, in writing, that there is a compelling reason for such action.

(b) In addition to the provisions of paragraph (a) of this section, persons debarred pursuant to § 223.137(g) shall be prohibited from entering into any contract to purchase unprocessed timber from Federal lands and shall also be precluded from taking delivery of Federal timber purchased by another person for the period of debarment.

\* \* \* \* \*

7. Amend § 223.136 by revising paragraph (b) to read as follows:

#### § 223.136 Debarment.

\* \* \* \* \*

(b) *Effect of proposed debarment.* (1) Upon issuance of a notice of proposed debarment by the debarring official and until the final debarment decision is rendered, the Forest Service shall not solicit or consider bids from, award contracts to, approve a third party agreement with, renew or otherwise extend, except pursuant to the terms of a contract term adjustment, any contract with that purchaser. The Chief of the Forest Service or authorized representative may waive this exclusion upon a written determination identifying compelling reasons to continue doing business with that purchaser pending completion of debarment proceedings.

(2) In addition to paragraph (b)(1) of this section, issuance of a notice of proposed debarment under § 223.137(g) shall preclude such person from entering into any contract to purchase unprocessed timber originating from Federal lands, and from taking delivery of unprocessed Federal timber from any other party who purchased such timber.

\* \* \* \* \*

8. Amend § 223.137 by adding paragraph (g) to read as follows:

#### § 223.137 Causes of debarment.

\* \* \* \* \*

(g) Violation of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) or any regulation or contract issued under the Act.

\* \* \* \* \*

9. Revise paragraphs (a) and (b) of § 223.139 to read as follows:

#### § 223.139 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s):

(1) The debarring official shall consider any suspension period or

period since issuance of the notice of proposed debarment in determining the debarment period.

(2) Generally, a debarment for those causes listed at § 223.137 (a)–(f) of this subpart should not exceed three (3) years, except as otherwise provided by law.

(3) A debarment for the causes listed at § 223.137(g) shall not exceed five (5) years.

(b) The debarring official may extend the debarment for those causes listed at § 223.137 (a)–(f) of this subpart for an additional period if that official determines that an extension is necessary to protect the Government's interest. However:

(1) A debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based;

(2) If debarment for an additional period is necessary, the debarring official shall initiate and follow the procedures in § 223.138 to extend the debarment.

\* \* \* \* \*

#### Subpart D—Timber Export and Substitution Restrictions

10. Revise § 223.159 to read as follows:

##### § 223.159 Scope and applicability.

The rules of this subpart apply to all timber sale contracts awarded before August 20, 1990, the date of enactment of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*). The rules at § 223.162 shall remain in effect for all contracts awarded on or after August 20, 1990, until September 8, 1995. Contracts awarded on or after August 20, 1990 are subject to the rules of subpart F of this part, unless otherwise noted. Contracts awarded on or after September 8, 1995 are governed in full by subpart F.

##### § 223.161 [Removed and reserved]

11. Remove and reserve § 223.161.

##### § 223.163 [Removed]

12. Remove § 223.163.

13. Subpart F is revised to read as follows:

#### Subpart F—The Forest Resources Conservation and Shortage Relief Act of 1990 Program

Sec.

223.185 Scope and applicability.

223.186 Definitions.

223.187 Determination of unprocessed timber.

223.188 Prohibitions against exporting unprocessed Federal timber.

223.189 Prohibitions against substitution.

223.190 Sourcing area application procedures.

223.191 Sourcing area disapproval and review procedures.

223.192 Procedures for a non-manufacturer.

223.193 Procedures for reporting acquisition and disposition of unprocessed Federal timber.

223.194 Procedures for reporting the acquisition and disposition of unprocessed private timber.

223.195 Procedures for identifying and marking unprocessed timber.

223.196 Civil penalties for violation.

223.197 Civil penalty assessment procedures.

223.198 Administrative remedies.

223.199 Procedures for cooperating with other agencies.

223.200 Determinations of surplus species.

223.201 Limitations on unprocessed timber harvested in Alaska.

223.202 Information requirements.

223.203 Indirect substitution exception for National Forest System timber from within Washington State.

##### § 223.185 Scope and applicability.

This subpart implements provisions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) that became effective upon enactment or as otherwise specified in the Act. As of September 8, 1995, this subpart applies to unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States that requires domestic processing. Except as provided later in this paragraph, this subpart applies to all unprocessed timber originating from National Forest System lands west of the 100th meridian in the contiguous 48 States acquired from timber sale contracts awarded on or after August 20, 1990. The rules regarding substitution at § 223.162 of subpart D apply to unprocessed timber acquired from timber sale contracts awarded between August 20, 1990, and September 8, 1995, as provided in § 490(a)(2)(A) of the Act. The rules regarding reporting the acquisition and disposition of unprocessed Federal timber at § 223.193 of this subpart apply to all transfers of unprocessed Federal timber originating from National Forest System lands west of the 100th meridian in the contiguous 48 States regardless of timber sale contract award date.

##### § 223.186 Definitions.

The following definitions apply to the provisions of this subpart:

*Acquire* means to come into possession of, whether directly or indirectly, through a sale, trade, exchange, or other transaction. The term "acquisition" means the act of acquiring. The terms "acquire" and "purchase" are synonymous and are used interchangeably.

*Act* means the Forest Resources Conservation and Shortage Relief Act of 1990 (Pub. L. No. 101–382, 104 Stat. 714–726; 16 U.S.C. 620–620j).

*Area of operations* refers to the geographic area within which logs from any origin have neither been exported nor transported to an area where export occurs. The area of operations will be determined for individual Forest Service Administrative Units or groups of Administrative Units by the Regional Foresters of Regions 1, 2, 3, and 4 on an as-needed basis, and used as part of the criteria for evaluating requests to waive the identifying and marking requirements for unprocessed Federal logs.

*Cants* or *Flitches* are synonymous, and mean trees or portions of trees, sawn on one or more sides, intended for remanufacture into other products elsewhere.

##### *Civil penalties:*

*Willful disregard* means a person knew or showed reckless disregard for the matter of whether the person's conduct is prohibited by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, *et seq.* with regard to the prohibition against exporting unprocessed Federal timber (including causing unprocessed timber to be exported).

*Willfully* means a person knew or showed reckless disregard for the matter of whether the person's conduct is prohibited by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. *et seq.*, or regulations issued under the Act, even though such violation may not have caused the export of unprocessed Federal timber in violation of the Act.

*Disregard* means to ignore, overlook, or fail to observe any provision of the Act or a regulation issued under this Act, even though such violation may not have caused the export of unprocessed Federal timber in violation of the Act.

*Should have known* means committing an act that a reasonable person in the timber industry would have known violates a provision of the Act or regulations issued under the Act, even though the violation may not have caused the export of unprocessed Federal timber in violation of the Act.

*Each violation* refers to any violation under the Act or its implementing regulations with regard to a single act, which includes but is not limited to a single marking (or lack thereof) on a single log, the export of a single log, or a single entry on a document.

*Export* means transporting, or causing to be transported, either directly or through another party, unprocessed

timber to a foreign country. Export occurs:

(1) On the date that a person enters into an agreement to sell, trade, exchange or otherwise convey such timber to a person for delivery to a foreign country;

(2) When unprocessed timber is placed in an export facility in preparation (sorting, bundling, container loading etc.) for shipment outside the United States; or,

(3) When unprocessed timber is placed on board an ocean-going vessel, rail car, or other conveyance destined for a foreign country.

*Federal lands* means lands that are owned by the United States west of the 100th meridian in the contiguous 48 States, but do not include any land the title to which is:

(1) Held in trust by the United States for the benefit of any Indian tribe or individual;

(2) Held by any Indian tribe or individual subject to a restriction by the United States against alienation; or

(3) Held by any Native Corporation as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

*Finished products* means products from trees, portions of trees or other roundwood products processed to standards and specifications intended for end product use.

*Fiscal year* means the Federal fiscal year beginning October 1, and ending the following September 30.

*Gross value* means the total value a person received from the transfer of unprocessed Federal timber involved in a violation, before production, delivery, agent fees, overhead, or other costs are removed.

*Hammer brand* refers to an identifying mark or brand composed of numbers, letters, characters, or a combination of numbers, letters, or characters permanently attached to a hammer, or other similar striking tool. The hammer brand must make a legible imprint of the brand in the end of a log when struck.

*Highway yellow paint* refers to an oil base or equivalent yellow paint of lasting quality comparable to the yellow paint used to mark highways.

*Log* refers to an unprocessed portion of a tree that is transported to a manufacturing facility or other location for processing, transferring to another person, or exporting. "Logs" is synonymous with "timber".

*Manufacturing facility* means a permanently located processing plant used to convert unprocessed timber into products.

*Non-manufacturer* means a person who does not own or operate a manufacturing facility.

*Person* means any individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, parent company, and business affiliates. Persons are affiliates of each other when either directly or indirectly, one person controls or has the power to control the other or a third party or parties control or have the power to control both. In determining whether or not affiliation exists, consideration shall be given to all appropriate factors, including but not limited to common ownership, common management, common facilities, and contractual relationships.

*Private lands* means lands, located west of the 100th meridian in the contiguous 48 States held or owned by a person. Such term does not include Federal lands or public lands, or any land the title to which is:

(1) Held in trust by the United States for the benefit of any Indian tribe or individual;

(2) Held by any Indian tribe or individual subject to a restriction by the United States against alienation; or

(3) Held by any Native Corporation as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602).

*Processed* means timber processed into products listed in § 223.187 of these regulations.

*Purchase* has the same meaning as *acquire*. The terms are used interchangeably.

*Same geographic and economic area* means the land within the boundaries of an approved sourcing area.

*Sourcing area* means the geographic area approved by the Secretary which includes a person's timber manufacturing facility and the private and Federal lands from which the person acquires or intends to acquire unprocessed timber to supply such manufacturing facility; a sourcing area must be geographically and economically separate from any area from which that person harvests for export any unprocessed timber originating from private lands.

*Substitution* occurs when:

(1) A person acquires, directly or indirectly, unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States and engages in exporting or selling for export, unprocessed timber originating from private lands within the same geographic and economic area; or

(2) A person acquires, directly or indirectly, unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States

and, during the preceding 24-month period, exported unprocessed timber originating from private lands; or

(3) A person exports or sells for export, unprocessed timber originating from private lands within the same geographic and economic area in the same calendar year that the person has unprocessed timber originating from Federal lands in the person's possession or under contract; or

(4) A person purchases, directly or indirectly, unprocessed timber originating from Federal lands if such person sells or otherwise transfers unprocessed timber that originates from private lands west of the 100th meridian in the contiguous 48 States and that requires domestic processing, to a third party if that third party or successive parties export that unprocessed private timber. A third party or successive parties who acquire such unprocessed timber that originates from private lands west of the 100th meridian in the contiguous 48 States and that requires domestic processing may not export such timber.

*Transaction* means an arrangement involving the transfer of unprocessed timber.

*Transaction statement* is a signed copy of one of the transaction reporting forms in 36 CFR 223.193 and 223.194.

*Transfer* means to pass title, sell, trade, exchange, or otherwise convey unprocessed timber to another person.

*Unprocessed timber* means trees or portions of trees or other roundwood not processed to standards and specifications suitable for end product use and intended for remanufacture. Unprocessed timber does not include products intended for remanufacture that meet the criteria listed in § 223.187(a) (2) or (3). For the purposes of reporting and identifying under §§ 223.193, 223.194 and 223.195, unprocessed timber also means timber products listed in § 223.187 of these regulations, and other timber products including house logs that are part of a structure kit, that are indistinguishable from other unprocessed timber.

#### **§ 223.187 Determinations of unprocessed timber.**

(a) *All species except western red cedar.* Unprocessed timber, as defined in § 223.186 of this Subpart, does not include timber processed into any one of the following:

(1) Lumber or construction timbers, except western red cedar, meeting current American Lumber Standards Grades or Pacific Lumber Inspection Bureau Export R or N list grades, sawn on 4 sides, not intended for remanufacture. To determine whether

such lumber or construction timbers meet this grade and intended use standard, the shipper of record must have in its possession for each shipment or order, and available for inspection upon the request of the Forest Service:

(i) A legible copy of a lumber inspection certificate certified by a lumber inspection/grading organization generally recognized by the industry as setting a selling standard; and,

(ii) A statement by the manufacturer certifying under the penalties provided in section 492 of the Act (16 U.S.C. 620d) and the False Statements Act (18 U.S.C. 1001) that the products in the shipment or order are intended to be used as shipped, are manufactured into products, or processed into pulp, and are not to be manufactured into other products. The certification statements shall be made in accordance with paragraph (b) of this section. The certification statements in paragraph (b) of this section are not required if the lumber or construction timbers described in paragraph (a)(1) of this section or the pulpwood bolts described in paragraph (a)(8) of this section otherwise may be exported without regard to an intent to remanufacture or process into pulp. For instance, because the timber originates from private land from which timber may be exported.

(2) Lumber, construction timbers, or cants for remanufacture, except western red cedar, meeting current American Lumber Standards Grades or Pacific Lumber Inspection Bureau Export R or N list clear grades, sawn on 4 sides, not to exceed 12 inches (30.5 cm) thick. To determine whether such lumber, timbers, or cants meet this grading standard, the shipper of record must have in its possession for each shipment or order and available for inspection, upon the request of the Forest Service, a legible copy of a lumber inspection certificate certified by a lumber inspection/grading organization generally recognized by the industry as setting a selling standard.

(3) Lumber, construction timbers, or cants for remanufacture, except western red cedar, that do not meet the grades referred to in paragraph (a)(2) of this section and are sawn on 4 sides, with wane less than 1/4 of any face, not exceeding 8 3/4 inches (22.2 cm) thick.

(4) Chips, pulp, or pulp products.

(5) Veneer or plywood.

(6) Poles, posts, or piling cut or treated with preservatives for use as such.

(7) Shakes or shingles.

(8) Aspen or other pulpwood bolts, not exceeding 100 inches in length, exported for processing into pulp. Shippers of record of such pulpwood

bolts must have in their possession, and available for inspection upon request of the Forest Service, in accordance with paragraph (b) of this section, a manufacturer's certificate that such bolts are intended for processing into pulp.

(9) Pulp logs or cull logs processed at domestic pulp mills, domestic chip plants, or other domestic operations for the purpose of conversion of logs into chips.

(b) *Export product certifications.* (1) Manufacturers of lumber or construction timbers described in paragraph (a)(1) of this section and pulpwood bolts described in paragraph (a)(8) of this section, shall certify to the following statements:

(2) *Lumber or construction timbers;* "I certify that the products in the shipment identified by my shipping order number \_\_\_\_\_ dated \_\_\_\_\_, are manufactured in accordance with the attached order from (buyer) of (address), numbered \_\_\_\_\_ and dated \_\_\_\_\_, are intended to be used as shipped and are not to be remanufactured into other products. I make this certification with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*) (Act) and its implementing regulations. I fully understand that exporting unprocessed timber originating from Federal lands or unprocessed timber from private lands which is required to be processed domestically is a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violations."

(3) *Pulpwood bolts.* "I certify that the pulpwood bolts in the shipment identified by my shipping order number \_\_\_\_\_ dated \_\_\_\_\_, are manufactured in accordance with the attached order from (buyer) of (address), numbered \_\_\_\_\_ and dated \_\_\_\_\_, are intended to be processed into pulp and are not to be remanufactured into other products. I make this certification with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations. I fully understand that exporting unprocessed timber originating from Federal lands or unprocessed timber from private lands which is required to be processed domestically is a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violations."

(4) *Signatory procedures.* Certificates shall be on company letterhead, and signed by the person manufacturing the shipment. In the case of a corporation, the certificates must be signed by a person authorized, in writing, by the Chief Executive Officer pursuant to 36 CFR 223.187(b)(4), to sign the certificates in 36 CFR 223.187(b) on behalf of the corporation.

(5) *Chief Executive Officer Authorization.* The authorization by the Chief Executive Officer shall be on company letterhead, shall be notarized, and shall read as follows:

"I authorize \_\_\_\_\_ to sign the certificates in 36 CFR 223.187(b) on behalf of (name of corporation). I make this authorization with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620 *et seq.*) (Act) and its implementing regulations. I fully understand that exporting unprocessed timber originating from Federal lands or unprocessed timber originating from private lands which is required to be processed domestically is a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

(6) Exporters of other timber products originating from Federal lands not specifically listed in § 223.187 which may develop export markets in the future may also require similar certification statements. Such statements will be provided by the Forest Service.

(c) *Western red cedar.* Unprocessed western red cedar timber does not include manufactured lumber authorized for export under license by the Department of Commerce, and lumber from private lands processed to standards established in the lumber grading rules of the American Lumber Standards Association or the Pacific Lumber Inspection Bureau, or timber processed into any of the following products:

(1) Lumber of American Lumber Standards Grades of Number 3 dimension or better, or Pacific Lumber Inspection Bureau Export R-List Grades of Number 3 common or better, with a maximum cross section of 2,000 square centimeters (310 square inches) for any individual piece of processed western red cedar, regardless of grade. To determine whether such lumber meets these established standards, grades and size restrictions, the shipper of record must have in its possession for each shipment, and available for inspection upon the request of the Forest Service, a legible copy of a lumber inspection certificate certified by a lumber

inspection/grading organization generally recognized by the industry as setting a selling standard. Export restrictions governing western red cedar timber harvested from Federal, State or other public lands are found in 7(i) of the Export Administration Act of 1979 as amended (50 U.S.C. appendix 2406(i)), and implementing regulations at 15 CFR 777.7.

(2) Chips, pulp, and pulp products;

(3) Veneer and plywood;

(4) Poles, posts, pilings cut or treated with preservatives for use as such and not intended to be further processed; and

(5) Shakes and shingles.

(d) *Finished Products.* Shippers of record of products manufactured from unprocessed western red cedar originating from Federal lands, acquired by the manufacturer under the exemption from the prohibition against indirect substitution at § 223.189(e)(1), must have in their possession for each shipment a certificate from the manufacturer that such products are *finished products* as defined in § 223.186 of this subpart. The certification statement shall read as follows:

(1) "I certify that the products in the shipment identified by my shipping order number \_\_\_\_\_, dated \_\_\_\_\_, are manufactured in accordance with the attached order from \_\_\_\_\_ (buyer) \_\_\_\_\_ of \_\_\_\_\_ (address) \_\_\_\_\_, numbered \_\_\_\_\_ and dated \_\_\_\_\_, are intended for end product use. I understand that only western red cedar products that are *finished products* are exempt from the prohibition against indirect substitution in the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620b(b)(1)) and its implementing regulations. I make this certification with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations. I fully acknowledge and understand that to acquire western red cedar under the indirect substitution exemption in 16 U.S.C. 620b(b)(1) for purposes other than domestic processing into finished products will be a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001) and may subject me to the penalties and remedies provided for such violation."

(2) *Signatory procedures.* Certificates shall be on company letterhead, and signed by the person manufacturing the shipment. In the case of a corporation, the certificate must be signed by a person authorized, in writing, by the Chief Executive Officer, pursuant to 36

CFR 223.187(d)(3), to sign the certificate in 36 CFR 223.187(d)(1) on behalf of the corporation.

(3) *Chief Executive Officer Authorization.* The authorization by the Chief Executive Officer shall be on company letterhead, shall be notarized, and shall read as follows:

"I authorize \_\_\_\_\_ to sign the certificate in 36 CFR 223.187(d)(1) on behalf of (name of corporation). I make this authorization with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations. I fully understand that exporting unprocessed timber originating from Federal lands or unprocessed timber originating from private lands which is required to be processed domestically is a violation of this Act, its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

#### **§ 223.188 Prohibitions against exporting unprocessed Federal timber.**

No person who acquires unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States may export such timber from the United States, or sell, trade, exchange, or otherwise convey such timber to any other person for the purpose of exporting such timber from the United States. This prohibition does not apply to specific quantities of grades and species of such unprocessed Federal timber that the Secretary of Agriculture determines to be surplus to domestic manufacturing needs.

#### **§ 223.189 Prohibitions against substitution.**

(a) *Direct substitution prohibition.* Except as otherwise provided by this section:

(1) No person may purchase directly from any department or agency of the United States unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States if:

(i) Such person acquires unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States and engages in exporting or selling for export, unprocessed timber originating from private lands within the same geographic and economic area; or

(ii) Such person has, during the preceding 24-month period, exported unprocessed timber originating from private lands.

(2) No person may export or sell for export, unprocessed timber originating from private lands within the same geographic and economic area in the same calendar year that the person has

unprocessed timber originating from Federal lands in the person's possession or under contract.

(3) No person may purchase unprocessed timber originating from Federal lands if such person sells or otherwise transfers unprocessed timber that originates from private lands west of the 100th meridian in the contiguous 48 States and that requires domestic processing, to a third party if that third party or successive parties export that unprocessed private timber. A third party or successive parties who acquire such unprocessed timber that originates from private lands west of the 100th meridian in the contiguous 48 States and that requires domestic processing may not export such timber.

(4) The prohibitions in paragraphs (a) (1)–(3) of this section shall not apply to specific quantities of grades and species of unprocessed timber which the Secretary of Agriculture has determined to be surplus to domestic manufacturing needs.

(b) *Exemptions.* (1) Pursuant to section 490(c) of the Act (16 U.S.C. 620b), all persons who applied for a sourcing area by December 20, 1990, in accordance with § 223.190 of this subpart, were exempt from the prohibitions against substitution, in accordance with § 223.189(a)(1) of this subpart, until such time that the approving official approved or disapproved the application.

(2) Pursuant to Section 490(a) of the Act (16 U.S.C. 620b), an exemption to the prohibition in § 223.189(a)(1)(B) of this subpart is provided to:

(i) A person with a historic export quota who submitted a certification in accordance with § 223.189 (c) and (d) of this subpart; and

(ii) A non-manufacturer who submitted a certification in accordance with § 223.192 of this subpart.

(3) Pursuant to § 490(c) of the Act (16 U.S.C. 620b), the prohibitions against direct substitution in § 223.189(a) (1) and (2) of this subpart do not apply to a person who acquires unprocessed timber originating from Federal lands within an approved sourcing area, does not export unprocessed timber originating from private lands within the approved sourcing area while the approval is in effect, and, if applicable, received a waiver of the prohibition against exporting unprocessed timber originating from private lands within the sourcing area during the preceding 24 months, in accordance with § 223.189 (f) and (g) of this subpart.

(c) *Historic export quota exemption.* The prohibition against the purchase of Federal timber for a person who has exported unprocessed timber originating



from private lands, within the preceding 24-month period, shall not apply to a person with a historic export quota approved by the Secretary and who has been exporting unprocessed private timber in accordance with the log export and substitution regulations of the Secretary of Agriculture at 36 CFR part 223, subpart D, in effect before August 20, 1990, if:

(1) That person certified in writing to the Regional Forester of the Region administering the historic export quota, on or before November 20, 1990, that the person would cease exporting unprocessed timber originating from private lands on or before February 20, 1991, and

(2) The exporting ceased in accordance with such certification.

(d) *Application for historic export quota exemption.* To obtain an exemption from the prohibition against export within the preceding 24-month period for purchasing Federal timber based on an approved historic export quota described in paragraph (c) of this section, a person must have applied in writing to the applicable Regional Forester on or before November 20, 1990. The certificate must have been notarized. The application was required to be on company letterhead and must have included:

(1) An agreement to retain records of all transactions involving acquisition and disposition of unprocessed timber from both private and Federal lands within the area(s) involved in the certification, for a period of three (3) years beginning November 20, 1990, and to make such records available for inspection upon the request of the Regional Forester, or other official to whom such authority has been delegated.

(2) A signed certification which reads as follows:

"I have purchased, under an historic export quota approved by the Secretary of Agriculture, unprocessed timber originating from Federal lands located west of the 100th meridian in the contiguous 48 States during the preceding 24 months in direct substitution for exported unprocessed timber originating from private lands. I desire to purchase directly from a Department or agency of the United States, unprocessed timber originating from Federal lands located in such area of the United States. I make this certification for the exemption from the prohibition against export within the preceding 24-month period for purchasing Federal timber required by the Forest Resources Conservation and Shortage Relief Act of 1990, (Pub. L. No. 101-382, August 20, 1990, 16 U.S.C. 620, *et seq.*) (Act). I hereby certify that I will cease all exporting of such unprocessed private timber from lands west of the 100th meridian in the 48 contiguous

States of the United States by February 20, 1991. I make this certification with full knowledge and understanding of the requirements of this Act and do fully understand that failure to cease such exporting as certified will be a violation of this Act (16 U.S.C. 620d) and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided from such violation."

(3) The certification must have been signed by the person making such certification or, in the case of a corporation, by its Chief Executive Officer.

(e) *Indirect substitution prohibition.* No person may purchase from any other person unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States if such person would be prohibited by paragraph (a) of this section from purchasing such timber directly from a Department or agency of the United States, pursuant to § 490(b) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*). The prohibition in this paragraph does not apply to the following:

(1) To the acquisition of western red cedar, which is domestically processed into finished products.

(2) To a person who acquires unprocessed timber originating from Federal lands within an approved sourcing area, does not export unprocessed timber originating from private lands within the approved sourcing area while the approval is in effect, and, if applicable, receives a waiver of the prohibition against exporting unprocessed timber originating from private lands within the sourcing area during the preceding 24 months in accordance with § 223.189 (f) and (g) of this subpart.

(3) To the limited amount of unprocessed National Forest System timber within Washington State that is exempt from the prohibition against indirect substitution, pursuant to § 223.203.

(f) *Waiver within a sourcing area.* The prohibitions in § 223.189(a) (1) and (2) against direct and indirect acquisition of unprocessed timber originating from Federal lands do not apply if:

(1) A person acquires such timber from within an approved sourcing area located west of the 100th meridian in the 48 contiguous States;

(2) Has not exported unprocessed timber originating from private lands located within the approved sourcing area during the preceding 24 months;

(3) Does not export such private timber from within the approved sourcing area during the period the sourcing area is in effect; and

(4) Does not export such private timber during any calendar year in the same geographic and economic area that unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States is under contract or in possession, if the sourcing area is no longer in effect, pursuant to the definition of substitution in 36 CFR 223.186.

(5) The appropriate Regional Forester could waive, in writing, the prohibition against export within the preceding 24-month period for any person who certified in writing, on or before November 20, 1990, that on or before February 20, 1991, that person would cease exporting unprocessed timber originating from private lands within the approved sourcing area for a period of not less than three (3) years.

Signatories of this certificate who received an approved sourcing area, like all holders of sourcing areas, are subject to the prohibition against exporting unprocessed timber originating from private lands within the sourcing area boundaries, pursuant to this paragraph.

(g) *Application for waiver within a sourcing area.* To obtain a waiver of the prohibition against export within the preceding 24-month period for purchasing Federal timber described in paragraph (f) of this section, a person must have submitted a request for waiver, in writing, to the Regional Forester of the region in which the manufacturing facility being sourced is located, which must have been received by the Regional Forester on or before November 20, 1990, and which must have been signed by the person making such request or, in the case of a corporation, by its Chief Executive Officer. The request for waiver must be notarized and, in the case of a corporation, with its corporate seal affixed. The request shall be on company letterhead with its corporate seal affixed and must include:

(1) An agreement to retain records of all transactions involving acquisition and disposition of unprocessed timber from both private and Federal lands within the area(s) involved in the waiver request, for a period of three (3) years beginning November 20, 1990, and to make such records available for inspection upon the request of the Regional Forester, or other official to whom such authority has been delegated.

(2) A signed certification statement which reads as follows:

"I have engaged in exporting of unprocessed timber originating from private land located within the sourcing area for which I am applying. I desire to purchase directly from a department or agency of the

United States unprocessed timber originating from Federal lands located within the desired sourcing area. I hereby request waiver of the prohibition against export within the preceding 24-month period for purchasing Federal timber required by the forest Resources Conservation and Shortage Relief Act of 1990 (Pub. L. No. 101-382, August 20, 1990, 16 U.S.C. 620, *et seq.*) (Act). I hereby certify that I will cease all exporting of such unprocessed private timber from within the desired sourcing area by February 20, 1991, and will not resume such exporting for a period of not less than three (3) years. I make this certification with full knowledge and understanding of the requirements of this Act and do fully understand that failure to cease such exporting as certified will be a violation of Section 492 of this Act (16 U.S.C. 620d) and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

**§ 223.190 Sourcing area application procedures.**

(a) Subject to the restrictions described in § 223.189 of this subpart and, except as provided in paragraph (b) of this section, a person who owns or operates a manufacturing facility and who exports unprocessed timber originating from private lands may apply for a sourcing area in accordance with the procedures of this section. However, an owner/operator of a manufacturing facility who exports unprocessed timber originating from Federal lands may not possess or acquire unprocessed timber originating from Federal lands unless the acquisition is within an approved sourcing area. A person who intends to acquire or become affiliated with a manufacturing facility that processes Federal timber and who is an exporter may apply for a sourcing area. Written proof of the intent to acquire or affiliate must be included in the sourcing area application, signed by the applicant and the person or, in the case of a corporation, the Chief Executive Officer, whose company the applicant intends to acquire or affiliate with. This certification must be on letterhead and must be notarized. A sourcing area application that the Secretary determines would be approved will be granted tentative approval pending final notification by the applicant of acquisition of or affiliation with the manufacturing facility. The tentative approval of the sourcing area will lapse unless the acquisition or affiliation occurs within 30 days of the tentative approval of the sourcing area. A sourcing area is not valid until final approval of the sourcing area. The direct substitution prohibition did not apply to a person who applied for a sourcing area on or before December 20, 1990. A request for modification of an existing

sourcing area shall trigger a review pursuant to the procedures and restrictions in § 223.191(e).

(b) As provided in the Act, a person who has requested an exemption or waiver of the prohibition against export within the preceding 24-month period, pursuant to § 223.189 of this subpart, must have applied for the desired sourcing area on or before December 20, 1990.

(c) *Applications.* Sourcing area applications shall include:

(1) A map of sufficient scale and detail to clearly show:

(i) The applicant's desired sourcing area boundary. This boundary will include both the private and Federal lands from which the applicant intends to acquire unprocessed timber for sourcing its manufacturing facilities;

(ii) The location of the timber manufacturing facilities owned or operated by the applicant within the proposed sourcing area where the person intends to process timber originating from Federal land;

(iii) The location of private lands within and outside the desired sourcing area where the person has, within the 24 months immediately preceding the date of the application, acquired unprocessed timber originating from private land which was exported, sold, traded, exchanged, or otherwise conveyed to another person for the purpose of exporting such timber;

(2) A list of other persons with timber manufacturing facilities located within the same general vicinity as the applicant's facilities;

(3) Any other information the applicant may believe is appropriate to support approval of the requested sourcing area; and

(4) A statement signed by the person certifying under the penalties provided in Section 492 of this Act (16 U.S.C. 620d) and the False Statements Act (18 U.S.C. 1001) that the information provided in support of the application is true, complete, and accurate to the best of the applicant's knowledge. The statement shall read as follows:

"I certify under penalties of 16 U.S.C. 620d and 18 U.S.C. 1001, that the information provided in support of this application, is true, complete, and accurate to the best of my knowledge concerning my timber purchasing and export patterns. I certify that the information provided concerning my timber purchasing and export patterns fully and accurately reflects, to the best of my knowledge, the boundaries of the sourcing area for which I am applying. I make this certification with full knowledge and understanding of the export and substitution restrictions of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its

implementing regulations. I certify that I have not exported unprocessed timber originating from private lands within the boundaries of the sourcing area that is the subject of this application in the previous 24 months. I fully understand that, if this application is approved, exporting unprocessed private timber originating from within the approved sourcing area will be a violation of this Act (16 U.S.C. 620, *et seq.*) its implementing regulations, and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

(d) *Confidential information.*

Applications are not considered confidential. However, if a person does submit confidential information as part of an application, the information should be marked confidential. Information so marked will be afforded the rights and protection provided under the Freedom of Information Act.

(e) *Where to submit the application.* A sourcing area applicant shall send the application to the Office of Administrative Law Judges and shall, simultaneously, send a copy of the sourcing area application to the Forest Service Regional Forester of the region in which the manufacturing facility being sourced is located. Where the sourcing area application will cover purchases from more than one agency, application is to be made to the agency from which the applicant expects to purchase the preponderance of its Federal timber. The sourcing area applicant must also send a complete copy of the application to each agency concerned. The lead agency shall make the decision in consultation with, and upon co-signature of, the other agencies concerned.

(f) *Signatory procedures.* Sourcing area applications must be signed by the person making the request, or in the case of a corporation, by its Chief Executive Officer, and must be notarized. The application shall be on company letterhead.

(g) The sourcing area application and review process will be conducted pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), found at 7 CFR part 1, subpart M.

(h) A final decision on a sourcing area application or a formal sourcing area review will be issued within four (4) months of the receipt of the application or initiation of the review.

(i) The following criteria must be met for sourcing area approval:

(1) The Administrative Law Judge, or, on appeal, the Judicial Officer must find that the proposed sourcing area is

geographically and economically separate from any area that the applicant harvests or expects to harvest for export any unprocessed timber originating from private lands. In making such a finding, the Administrative Law Judge, or, on appeal, the Judicial Officer shall consider the timber purchasing patterns of the applicant on private and Federal lands equally with those of other persons in the same local vicinity and the relative similarity of such purchasing patterns.

(2) The "same local vicinity" will normally be manufacturing facilities located within 30 miles of the community where the applicant's manufacturing facility is located, but may include more distant communities if manufacturing facilities in those communities depend on the same source of timber and have similar purchasing patterns.

(3) The relative similarity of purchasing patterns of other mills shall be determined by considering the location and similarity of unprocessed timber being acquired by those facilities.

(4) Lines defining the geographic area shall be based on major natural and cultural features, including, but not limited to, prominent ridge systems, main roads or highways, rivers, political subdivisions, and not characterized by random lines.

(j) *Comments.* Persons may submit comments on sourcing area applications pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, et seq.), found at 7 CFR part 1, subpart M. Persons submitting a comment must certify at the end of the comment, but before the signature, to the following: "I certify that the information provided by me is true and accurate, to the best of my knowledge, and I understand that failure to provide true and accurate information could be violation of the False Statements Act (18 U.S.C. 1001)."

(k) Transporting or causing to be transported unprocessed private timber from outside of a sourcing area into a sourcing area by the holder of the sourcing area is prohibited as a violation of the sourcing area boundary. Such violation will cause a review of the sourcing area, and could subject the sourcing area holder to the penalties and remedies for violations of the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620, et seq., and its implementing regulations.

(1) A person with an approved sourcing area may relinquish the

sourcing area at any time provided the person certifies to the following:

"I am relinquishing the approved sourcing area, described in the Secretary's determination in FSAA \_\_\_\_\_ on \_\_\_\_\_, 19\_\_\_\_. I understand that I may not export unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States during the fiscal year in which I have unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States in my possession or under contract, pursuant to the prohibition against substitution in the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, et seq.) ("Act") and its implementing regulations. I also understand that I may not purchase unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States within 24 months of having exported unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States, pursuant to the prohibitions against substitution in the Act and its implementing regulations. I make this certification with full knowledge and understanding of the Act and its implementing regulations and do fully understand that exporting unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States during a fiscal year in which I have unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States in possession or under contract, or purchasing unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States within 24 months of having exported unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States is a violation of the substitution provisions of the Act and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

The certificate must be signed by the person making such certification or, in the case of a corporation, by its Chief Executive Officer; must be on company letterhead; and must be notarized.

(m) A sourcing area is in effect until it is relinquished by the sourcing area holder, or is disapproved upon review of the sourcing area.

#### **§ 223.191 Sourcing area disapproval and review procedures.**

(a) Notwithstanding any other provision of law, an applicant whose sourcing area application was submitted by December 20, 1990, and was disapproved could either phase out of purchasing Federal timber or phase out of exporting unprocessed timber originating from private lands within the sourcing area that would have been approved, as follows:

(1) *Phase-out of Federal timber purchasing.* The applicant could purchase, in the 9-month period after receiving the application disapproval,

unprocessed timber originating from Federal lands in the disapproved sourcing area, in an amount not to exceed 75 percent of the annual average of such person's purchases of unprocessed Federal timber in such area during the 5 full fiscal years immediately prior to the date of submission of the application. In the 6-month period immediately following the 9-month period, such person could purchase not more than 25 percent of such annual average, after which time the prohibitions against direct substitution, set forth in § 223.189 of this subpart, shall apply; or

(2) *Phase-out of private timber exporting.* The applicant could continue to purchase unprocessed timber originating from Federal lands within the disapproved sourcing area without being subject to the phase-out of Federal timber purchasing procedures described in paragraph (a) of this section, if the following requirements were met:

(i) The applicant certified to the Regional Forester or the approving official to whom such authority has been delegated, within 90 days after receiving the disapproval decision, as follows:

(A) An applicant that has exported unprocessed timber originating from private lands from the geographic area that would have been approved provided a signed certification that reads as follows:

"I have engaged in the exporting of unprocessed private timber originating from private lands located within the geographic area the approving official would have approved as a sourcing area for my manufacturing facility. I desire to continue purchasing unprocessed Federal timber from within such area. I hereby certify that I will cease all exporting of unprocessed timber from private lands located within the area that would have been approved by [the applicant shall insert date 15 months from date of receipt of the disapproval decision]. I agree to retain records of all transactions involving acquisition and disposition of unprocessed timber from both private and Federal lands within the area involved in the certification, for a period of three (3) years beginning on the date of receipt of the disapproval notification, and to make such records available for inspection upon the request of the Regional Forester, or other official to whom such authority has been delegated. I make this certification with full knowledge and understanding of the requirements of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, et seq.) (Act) and do fully understand that failure to cease such exporting as certified will be a violation of the Act and may subject me to the penalties and remedies for such violation. Further, I fully understand that such violation may subject me to the penalty of perjury pursuant to the False Statements Act (18 U.S.C. 1001).

I certify that the information in this certificate is true, complete, and accurate to the best of my knowledge and belief.”;

or,

(B) An applicant who has not exported unprocessed timber originating from private lands from the geographic area that the Secretary would have approved provided a signed certification that reads as follows:

“I have not exported timber originating from private lands within both the sourcing area that the Secretary would have approved and the disapproved sourcing area in the past 24 months, pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), and I am accepting the area that the Secretary would have approved as my sourcing area. I certify that the information in this certificate is true, complete, and accurate to the best of my knowledge and belief.”

(ii) Each certification statement set forth in paragraph (a)(2)(i) of this section must have been signed by the person making such certification or, in the case of a corporation, by its Chief Executive Officer; must have been on company letterhead; must have been notarized; and must have had a corporate seal attached.

(iii) The person signing such certification set forth in paragraph (a)(2)(i)(A) of this section must have provided to the Regional Forester the annual volume of timber exported by that person during the five (5) full fiscal years immediately preceding submission of the application, originating from private lands in the geographic area for which the application would have been approved.

(iv) When the applicant submitted the certificate, the area the Secretary would have approved, as shown on the sourcing area map provided by the Secretary, became an approved sourcing area. If the certificate was not submitted, the sourcing area that would have been approved did not become an approved sourcing area.

(3) The phase-out of Federal timber purchasing and the phase-out of private timber exporting procedures provided by paragraphs (a)(1) and (a)(2) of this section do not apply to persons submitting sourcing area applications after December 20, 1990, or to persons requesting review of disapproved sourcing areas.

(b) *Limits on purchases and exports.*

(1) During the 15-month period following disapproval of a sourcing area, a person who elects to phase-out of private timber exporting as described in paragraph (a)(2) of this section, may not:

(i) Purchase more than 125 percent of the person's annual average purchases

of unprocessed timber originating from Federal lands within the person's disapproved sourcing area during the five (5) full fiscal years immediately prior to submission of the application; and,

(ii) Export unprocessed timber originating from private lands in the geographic area determined by the approving official for which the application would have been approved, in amounts that exceed 125 percent of the annual average of that person's exports of unprocessed timber from such private land during the five (5) full years immediately prior to submission of the application.

(2) At the conclusion of the 15-month export phase-out period, the prohibition against exporting private timber originating from within the area shall be in full force and effect as long as the sourcing area remains approved, pursuant to this subpart F of this part 223.

(c) *Presentation of map to applicant whose sourcing area is disapproved.* The area determined by the deciding official that would have been approved shall be drawn on a map and presented to the applicant by the deciding official with the notice of disapproval of the application.

(d) *Effect of prior certification to cease exporting.* An applicant's previous certification to cease exporting beginning February 20, 1991, for a period of three (3) years from within the disapproved sourcing area pursuant to paragraphs (f) and (g) in § 223.189 of this subpart shall remain in full force and effect for persons with approved and disapproved sourcing areas.

(e) *Review process and frequency.* (1) Approved sourcing areas shall be reviewed not less often than every five (5) years. A tentative date for a review shall be included in the Administrative Law Judge's, or, on appeal, the Judicial Officer's determination or stated in writing by the Regional Forester following the determination. At least 60 days prior to the tentative review date, the Regional Forester or other such reviewing official shall notify the person holding the sourcing area of the pending review, publish notice of such review in newspapers of general circulation within the sourcing area, and invite comments, to be received no later than 30 days from the date of the notice, from all interested persons, including the person holding the sourcing area. For 10 working days following the comment period, any person submitting a written comment and the person with the sourcing area may review the comments. If there is disagreement among the persons who submitted

written comments regarding the proper sourcing area, the reviewing official shall convene an informal meeting convenient to the persons that all interested persons may attend. If an agreement cannot be reached among the persons, formal administrative adjudication shall occur. The Administrative Law Judge, or, on appeal, the Judicial Officer shall, on the record and after opportunity for a hearing, approve or disapprove the sourcing area being reviewed, pursuant to the Rules of Practice Governing the Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), found at 7 CFR part 1, subpart M.

(2) Disapproved sourcing areas shall be reviewed using the process described in paragraph (e)(1) of this section upon resubmission of an application, provided the applicant has accepted the area the Secretary would have approved as a sourcing area pursuant to paragraph (a)(2) of this section.

(3) The Department reserves the right to schedule a review, at the request of the Forest Service or the person holding the sourcing area, at any time prior to the scheduled tentative review date, with 60 days notice.

(4) Sourcing areas being reviewed shall continue in full force and effect pending the final review determination.

(f) *Reporting and record keeping procedures.* The reporting and record keeping procedures in this section constitute information collection requirements as defined in 5 CFR part 1320. These requirements have been approved by the Office of Management and Budget and assigned clearance number 0596-0115.

#### § 223.192 Procedures for a non-manufacturer.

(a) Persons who do not own or operate a manufacturing facility (non-manufacturer) are not eligible to apply for or be granted a sourcing area.

(b) The prohibition against the purchase of Federal timber for a person who has exported unprocessed timber originating from private lands within the preceding 24-month period shall not apply, if the person certified in writing to the Regional Forester of the region(s) in which the person purchases National Forest System timber by November 20, 1990, that the person would cease exporting unprocessed timber originating from private lands by February 20, 1991, for a period of three (3) years, and the exporting did cease in accordance with such certification.

(c) To obtain an exemption from the prohibition against export within the preceding 24-month period for purchasing Federal timber described in § 223.189 (a) and (b) of this subpart, a person must have applied in writing to the applicable Regional Forester on or before November 20, 1990. The application was required to be on company letterhead and, in the case of a corporation, with its corporate seal affixed, and must have included:

(1) An agreement to retain records of all transactions involving acquisition and disposition of unprocessed timber from both private and Federal lands within the area(s) involved in the certification, for a period of three (3) years beginning November 20, 1990, and to make such records available for inspection upon the request of the Regional Forester, or other official to whom such authority has been delegated.

(2) A signed certification which reads as follows:

"I have engaged in the exporting of unprocessed timber originating from private lands located west of the 100th meridian in the contiguous 48 States during the preceding 24 months. I desire to purchase directly from a department or agency of the United States, unprocessed timber originating from Federal lands located in such area of the United States. I make this certification for the exemption from the prohibition against export within the preceding 24-month period for purchasing Federal timber required by the Forest Resources Conservation and Shortage Relief Act of 1990 (Pub. L. No. 101-382, August 20, 1990, 16 U.S.C. 620, *et seq.*) (Act). I hereby certify that I will cease all exporting of such unprocessed private timber from west of the 100th meridian in the contiguous 48 States of the United States by February 20, 1991. I make this certification with full knowledge and understanding of the requirements of this Act and do fully understand that failure to cease such exporting as certified will be a violation of this Act (16 U.S.C. 620d) and the False Statements Act (18 U.S.C. 1001), and may subject me to the penalties and remedies provided for such violation."

(3) The certification must have been signed by the person making such certification or, in the case of a corporation, by its Chief Executive Officer. The certificate must have been notarized.

**§ 223.193 Procedures for reporting acquisition and disposition of unprocessed Federal timber.**

(a) *Annual report.* Each person who directly or indirectly acquires or possesses unprocessed timber originating from National Forest System lands located west of the 100th meridian in the 48 contiguous States shall submit an annual report on a form

provided by the Forest Service on the acquisition and disposition of such timber. Such report shall be on a calendar year basis and shall be sent to the Regional Forester, or other official to whom such authority is delegated, who administers the National Forest System lands from which the majority of timber originated, not later than March 1 of each year, beginning March 1, 1997. The form shall include:

(1) A summary for the calendar year listing, by company, from whom the timber was acquired; the date of acquisition; the origin of National Forest System timber acquired; the sale name; the contract number(s); brand registration number(s) of brands registered by a state or agency or a pictorial representation of sale brand(s) if brands not registered by a state or agency; to whom the timber was sold, transferred or otherwise conveyed to another person; and the date of disposal;

(2) An accounting by origin, in net board feet Scribner or cubic feet, of the volume of National Forest System timber acquired, the volume domestically processed by the purchaser or affiliates, and the volume sold or transferred for domestic processing;

(3) The volume by species of National Forest System surplus species timber acquired and exported or sold for export;

(4) The volume (MBF Net Scribner or cubic) of the unprocessed timber originating from private lands west of the 100th meridian in the contiguous 48 States that was exported, and

(5) A certificate stating that:

(i) The certifier has read and understands the form;

(ii) The certifier is eligible to acquire unprocessed timber originating from Federal lands in accordance with the Act;

(iii) The information supplied is a true, accurate, current, and complete statement of the receipt and disposition of unprocessed timber originating from National Forest System lands to the best of the certifier's knowledge;

(iv) The certifier agrees to retain a copy of the form and records of all transactions involving unprocessed Federal timber and to make such records available for inspection upon request of an authorized official of the United States for three (3) years from the date of disposal by manufacture or transfer; and

(v) The certifier acknowledges that failure to report completely and accurately the receipt and disposition of timber will subject the certifier to the penalties and remedies in the Act and the penalties in the False Statements Act (18 U.S.C. 1001).

(6) The information provided is presumed to be not confidential, unless specifically marked confidential, in which case confidentiality will be evaluated under applicable laws.

(b) *Transfer of unprocessed National Forest System timber.* Each person who transfers to another person unprocessed timber originating from National Forest System lands shall undertake the following:

(1) Before completing such transfer, provide to such other person a written notice of origin, species, estimated volume or actual volume if the transfer is based on log scale volume, from whom acquired, sale name, contract number, and log brand of unprocessed National Forest System timber being transferred on a form provided by the Forest Service;

(2) Before completing such transfer, certify that the information supplied is a true, accurate, current, and complete statement to the best of his or her knowledge. As part of the certification, the certifier shall:

(i) Agree to send a signed copy of the form required in paragraph (b)(1) of this section within 10 calendar days of such transfer, which shall include all notices, acknowledgments, and agreements, required by this section, to the appropriate Regional Forester who administers the National Forest System lands from which this timber originates, or other official to whom such authority is delegated, and to retain a copy for the certifier's records;

(ii) Acknowledge that the transfer of unprocessed Federal timber to a person for export or to a person who may not purchase timber directly from the Federal government is a violation of the Act;

(iii) Agree to obtain full completed notice of origin form from the transferee;

(iv) Agree to retain records of all transactions involving unprocessed Federal timber for a period of three (3) years from the date of transfer and to make all records involving log transactions available to an appropriate Federal official upon request. Records include all forms and certificates required by these regulations;

(v) Acknowledge that failure to report completely and accurately the receipt and disposition and/or transfer of unprocessed National Forest System timber will subject the certifier to the penalties and remedies in the Act (16 U.S.C. 620, *et seq.*) and the penalties in the False Statements Act (18 U.S.C. 1001); and

(vi) Certify that he or she has read and understands the form.

(3) Before completing such transfer, obtain from the person acquiring such

timber on the same form provided by the Forest Service.

(i) An agreement to retain for a period of three (3) years from date of transfer the records of all sales, exchanges, or other disposition of such timber, and make such records available for inspection upon the request of an authorized official of the United States;

(ii) An agreement to allow Federal officials access to log storage and processing facilities for the purpose of monitoring compliance with the Act and implementing regulations;

(iii) An agreement to maintain and/or replace all brands and paint identifying the Federal origin of each piece of unprocessed Federal timber as described in § 223.195;

(iv) An agreement to submit, by March 1, the annual report required in § 223.193(a);

(v) An agreement to submit a completed notice of origin form for the Federal timber received and to receive an agreement to comply with the Act and regulations in such form if the person transfers any or all of the timber listed in the document;

(vi) An acknowledgment of the prohibition against acquiring unprocessed Federal timber from a person who is prohibited by the Act from purchasing the timber directly from the United States;

(vii) An acknowledgment of the prohibitions against exporting unprocessed Federal timber and against acquiring such timber in substitution for unprocessed private timber west of the 100th meridian in the contiguous 48 States;

(viii) A declaration of its business size and manufacturing classification, as defined under the Small Business Administration Regulations at 13 CFR part 121; and

(ix) A certificate stating that the certifier has read and understands the form; is eligible to acquire unprocessed timber originating from Federal lands in accordance with the Act; has been notified that some or all of the unprocessed timber included in this transfer is subject to export and substitution restrictions; supplied information is a true, accurate, current, and complete statement of the receipt and disposition of the unprocessed timber originating from National Forest System lands to the best of the certifier's knowledge; and acknowledges that failure to report completely and accurately the transfer of unprocessed Federal timber will subject the certifier to the penalties and remedies in the Act (16 U.S.C. 620, *et seq.*) and the penalties in the False Statements Act (18 U.S.C. 1001). The information provided is

presumed to be not confidential, unless specifically marked confidential, in which case confidentiality will be evaluated under applicable laws.

(4) Except as otherwise provided by law, a person who transfers unprocessed Federal timber to another person and meets all notice, certification, acknowledgment, reporting and record keeping requirements contained in this section shall be relieved from further liability for such timber pursuant to the Act.

**§ 223.194 Procedures for reporting the acquisition and disposition of unprocessed private timber.**

(a) *Notice of domestic processing requirement.* Each person who acquires unprocessed timber originating from Federal lands located west of the 100th meridian in the 48 contiguous States, and who also possesses or acquires unprocessed timber from private lands located west of the 100th meridian in the 48 contiguous States that requires domestic processing, including unprocessed timber originating within an approved sourcing area, and in turn sells, trades or otherwise conveys such unprocessed private timber to another person, must include a statement notifying the person acquiring the unprocessed private timber that such private timber must be domestically processed. Unprocessed timber originating from private lands located outside of a sourcing area may be transferred by the holder of the sourcing area, or by persons acquiring such unprocessed timber who are eligible to export such timber, without including such a statement.

(b) The notification statement, pursuant to paragraph (a) of this section, shall accompany each transaction involving unprocessed private timber that requires domestic processing. The statement shall be on a form provided by the Forest Service or a legible copy of such form.

(1) On such form, described in paragraph (b) of this section, the person transferring the timber shall:

(i) Give notice to the person receiving the unprocessed private timber that exporting that timber would violate the Act and its implementing regulations;

(ii) Give notice to the person receiving the unprocessed private timber that the timber has been identified for domestic manufacturing by a spot of highway yellow paint on each log end that must be retained on the timber;

(iii) Agree to send a signed copy of the transaction statement to the Regional Forester within 10 calendar days of the transaction;

(iv) Agree to retain records of all transactions involving the acquisition and disposition of unprocessed timber for a period of three (3) years from the date of disposal by manufacturing or transfer and to make such records available for inspection upon the request of an authorized official of the United States;

(v) Acknowledge that failure to completely and accurately report and identify unprocessed timber is a violation of the Act, and regulations issued under the Act, and the False Statements Act (18 U.S.C. 1001); and

(vi) Certify that the form has been read and understood.

(2) On such form, described in paragraph (b), the person acquiring the timber shall:

(i) Acknowledge receipt of the notice of requirement to domestically process timber originating from private land;

(ii) Certify that a statement pursuant to paragraph (b)(1) will be included in any subsequent transaction documents;

(iii) Agree to maintain yellow paint markings on each log end until the timber is domestically processed or transferred;

(iv) Agree to retain records of all transactions involving the acquisition and disposition of unprocessed timber for a period of three (3) years from the date of disposal by manufacturing or transfer and to make such records available for inspection upon the request of an authorized official of the United States;

(v) Agree to send a signed copy of the transaction statement to the Regional Forester within 10 calendar days of the transaction;

(vi) Agree to allow authorized officials access to log storage and processing facilities for the purpose of monitoring compliance with the Act and its implementing regulations;

(vii) Acknowledge that failure to comply with the domestic manufacturing requirements for unprocessed timber or failure to notify subsequent persons of this requirement may subject the certifier to the civil penalties and administrative remedies provided in the Act and regulations issued under the Act;

(viii) Acknowledge that failure to completely and accurately report and identify unprocessed timber is a violation of the Act, and regulations issued under the Act, and the False Statements Act (18 U.S.C. 1001); and

(ix) Certify that the form has been read and understood.

(c) Except as otherwise provided by law, a person who transfers unprocessed private timber to another person and meets all notice, certification,

acknowledgement, distribution, reporting and record keeping requirements contained in this section shall be relieved from further liability for such timber with regard to the export and substitution restrictions pursuant to the Act.

**§ 223.195 Procedures for identifying and marking unprocessed timber.**

(a) *Highway yellow paint.* The use of highway yellow paint on unprocessed logs west of the 100th meridian in the contiguous 48 States shall be reserved for identifying logs requiring domestic manufacturing.

(b) *Preserving identification.* All identifying marks placed on an unprocessed log to identify the National Forest System origin of that log and/or to identify the log as requiring domestic processing shall be retained on the log until the log is domestically processed. If the identifying marks are lost, removed, or become unreadable, they shall be replaced. If the log is cut into two or more segments, each segment shall be identified in the same manner as the original log.

(1) A generic log hammer brand, known as a "catch brand", used to identify ownership, may be used to replace lost, removed, unreadable or otherwise missing brands where such use is authorized by the Regional Forester and approved by the Contracting Officer. Use of such a catch brand on a log or log segment will signify Federal origin.

(2) The requirement to preserve identification of log pieces shall not apply to logs cut into two or more segments as a part of the mill in-feed process immediately before processing. Log segments that are returned to or placed in storage must be marked on both ends with yellow paint.

(c) *National Forest System logs.* Except as otherwise provided in this subsection, all unprocessed logs originating from National Forest System timber sales west of the 100th meridian in the contiguous 48 States shall, before being removed from the timber sale area, be marked on each end as follows:

(1) Painted on each end with a spot of highway yellow paint not less than three square inches in size; and,

(2) Branded on each end with a hammer brand approved for use by the Forest Supervisor of the National Forest from which the logs originate. The brand pattern may not be used to mark logs from any other source for a period of 24 months after all logs have been removed from the sale area and until such brand pattern is released in writing by the Forest Supervisor.

(d) *Private logs.* All unprocessed logs originating from private lands west of the 100th meridian in the contiguous 48 States that require domestic manufacturing pursuant to § 223.194 of this subpart, shall be painted on each end with a spot of highway yellow paint not less than three (3) square inches in size before removal from the harvest area. If private logs are acquired by a person who may not export such logs, the logs must be marked by the person acquiring the logs at the time of the acquisition.

(e) *Waiver of painting requirements.* The log painting requirements pursuant to paragraphs (c)(1) and (d) of this section may be waived if the Chief of the Forest Service determines that alternate methods for identifying logs required to be domestically processed are equal to or better than the procedures required herein.

(f) *Waiver of branding requirements.* Regional Foresters may waive the branding requirements pursuant to paragraph (c)(2) of this section as follows:

(1) *Regions 1, 2, 3, and 4.* On an individual timber sale basis, all or a portion of the branding requirements pursuant to paragraph (c)(2) of this section may be waived, if:

(i) Unprocessed logs from any origin are not known to have been exported by any person from the person's area of operations within the previous 5 years.

(ii) The person certifies as follows:

"I hereby request waiver of the requirements to brand each end of individual logs originating from the \_\_\_\_\_ timber sale, Forest Service contract number \_\_\_\_\_ pursuant to 36 CFR 223.195. I certify that I have not exported or sold for export unprocessed timber from private lands within my area of operations in five years. I certify that I understand, that if granted, the waiver applies only to unprocessed logs being processed within my area of operations. I certify that any unprocessed logs to which this waiver applies that are transferred, or sold for transfer, outside my area of operations will be branded on both ends in full compliance with 36 CFR 223.195. I make this certification with full knowledge and understanding of the requirement of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations at 36 CFR part 223. I fully understand that failure to abide by the terms of the waiver will be a violation of this Act (16 U.S.C. 620, *et seq.*) and the False Statements Act (18 U.S.C. 1001) and may subject me to the penalties and remedies provided for such violation.";

and,

(iii) The person otherwise complies with the regulations relating to transfers of logs between persons.

(iv) If the Regional Forester determines that unprocessed logs from my origin are being exported, or are known to have been exported within the previous 5 years, by any person from the person's area of operations, the Regional Forester shall revoke the waiver.

(2) *Regions 5 and 6.* On an individual timber sale basis, the branding requirement pursuant to paragraph (c)(2) of this section may be waived for logs ten (10) inches or less in diameter inside bark on the large end may be waived if:

(i) One end of each log is branded;

(ii) The person certifies as follows:

"I hereby request waiver of the requirement to brand each end of individual logs ten (10) inches or less in diameter inside bark on the large end, originating from the \_\_\_\_\_ timber sale, U.S. contract number \_\_\_\_\_ pursuant to 36 CFR 223.195. I certify that I understand, if granted, that the waiver applies only to unprocessed logs being processed at \_\_\_\_\_, and further certify that any and all unprocessed logs to which waiver would apply that are transferred, or sold for transfer, will be branded on both ends in full compliance 36 CFR 223.195. I make this certification with full knowledge and understanding of the requirements of the Forest Resources Conservation and Shortage Relief Act of 1990 (Pub. L. No. 101-382, August 20, 1990; 16 U.S.C. 620, *et seq.*) (Act) and its implementing regulations at 36 CFR Part 223. I fully understand that failure to abide by the terms of the waiver will be a violation of this Act (16 U.S.C. 620, *et seq.*) and the False Statements Act (18 U.S.C. 1001) and may subject me to the penalties and remedies provided for such violation.";

and,

(iii) The purchaser otherwise complies with the regulations relating to transfers of logs between persons.

(iv) If the Regional Forester determines that logs ten (10) inches or less in diameter inside bark on the large end are being exported in the Region, the Regional Forester shall revoke the waiver.

(3) The Chief of the Forest Service may authorize the testing of alternative methods of branding for consideration in future amendment of these regulations. Such alternative methods and logs marked under those methods shall be closely monitored.

**§ 223.196 Civil penalties for violation**

(a) *Exporting Federal timber.* If the Secretary of Agriculture finds, on the record and after providing an opportunity for a hearing, that a person, with willful disregard for the prohibition in the Act exporting unprocessed Federal timber, exported or caused to be exported unprocessed timber originating from Federal lands in



violation of the Act, the Secretary may assess against such person a civil penalty of not more than \$500,000 for each violation, or 3 times the gross value of the unprocessed timber involved in the violation, whichever amount is greater.

(b) *Other violations.* If the Secretary of Agriculture finds, on the record and after providing an opportunity for a hearing, that a person has violated any provision of the Act, or any regulation issued under the Act relating to National Forest System lands, even though that the violation may not have caused the export of unprocessed Federal timber in violation of such Act, the Secretary may:

(1) Assess against such person a civil penalty of not more than \$500,000, if the Secretary determines that the person committed such violation willfully;

(2) Assess against such person a civil penalty of not more than \$75,000 for each violation, if the Secretary determines that the person committed such violation in disregard of such provision or regulation; or

(3) Assess against such person a civil penalty of not more than \$50,000 for each violation, if the Secretary determines that the person should have known that the action constituted a violation.

(c) *Penalties not exclusive and judicial review.* A penalty assessed under paragraph (a) or (b) of this section shall not be exclusive of any other penalty provided by law, and shall be subject to review in an appropriate United States district court.

#### **§ 223.197 Civil penalty assessment procedures.**

Adjudicatory procedures for hearing alleged violations of this Act and its implementing regulations and assessing penalties shall be conducted under the rules of practice governing formal adjudicatory proceedings instituted by the Secretary. Such procedures are found at 7 CFR 1.130, *et seq.*

#### **§ 223.198 Administrative remedies.**

In addition to possible debarment action provided under subpart C of this part, the Chief of the Forest Service, or other official to whom such authority is delegated, may cancel any timber sale contract entered into with a person found to have violated the Act or regulations issued under the Act. Such a finding shall constitute a serious violation of contract terms pursuant to § 223.116(a)(1) of this part.

#### **§ 223.199 Procedures for cooperating with other agencies.**

The Regional Foresters may enter into agreements to cooperate with the

Department of the Interior, the Department of Defense, and other Federal, State and local agencies for monitoring, surveillance and enforcing the Act.

#### **§ 223.200 Determinations of surplus species.**

(a) Determinations that specific quantities of grades and species are surplus to domestic manufacturing needs and withdrawals of such determinations shall be made in accordance with title 5, United States Code, section 553.

(b) Review of a determination shall be made at least once in every 3-year period. Notice of such review shall be published in the **Federal Register**. The public shall have no less than 30 days to submit comments on the review.

(c) Alaska yellow cedar and Port Orford cedar, which the Secretary of Agriculture found to be surplus to domestic processing needs pursuant to 36 CFR 223.163, the rules in effect before August 20, 1990, shall continue in that status until new determinations are published.

#### **§ 223.201 Limitations on unprocessed timber harvested in Alaska.**

Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in Alaska for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities. In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will:

(a) Permit more complete utilization on areas being logged primarily for local manufacture,

(b) Prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market,

(c) Permit the salvage of timber damaged by wind, insects, fire or other catastrophe,

(d) Bring into use a minor species of little importance to local industrial development, or

(e) Provide material required to meet urgent and unusual needs of the Nation. (16 U.S.C. 472a; 16 U.S.C. 551; 16 U.S.C. 616)

#### **§ 223.202 Information requirements.**

(a) The procedures in §§ 223.189 and 223.192, and some of the procedures in § 223.190 were approved by the Office

of Management and Budget (OMB) and assigned Control Number 0596-0114 upon issuance of the interim rule. Control Number 0596-0114 has been reapproved by OMB for use through May 31, 1997. OMB approved the information collection requirements in §§ 223.191 and 223.203 for use through August 31, 1995, and assigned them Control Number 0596-0115. OMB approved the information collection requirements in §§ 223.48 and 223.87 for use through March 31, 1997 and assigned them Control Number 0596-0021; the information collection requirements in §§ 223.48 and 223.87 have been revised. OMB Control Numbers 0596-0114, 0596-0115, and 0596-0021 have been consolidated under OMB Control Number 0596-0114.

(b) The application and reporting procedures in §§ 223.187, 223.193, 223.194, 223.195, and some of the procedures in § 223.190 of this final rule contain new record keeping and reporting requirements as defined in 5 CFR part 1320 and, therefore, impose additional paperwork burdens on the affected public. The Office of Management and Budget (OMB) has approved these requirements, and assigned them Control Number 0596-0114.

#### **§ 223.203 Indirect substitution exception for National Forest System timber from within Washington State.**

(a) *Exception limits.* A limited amount of unprocessed National Forest System timber originating from within Washington State could have been acquired by a person otherwise covered by the prohibition against indirect substitution, pursuant to § 490(b) of the Act and § 223.189(e) of this subpart.

(1) The amount of such unprocessed timber was limited to whichever is less:

(i) The higher of the applicant's actual purchase receipts for unprocessed timber originating from National Forest System lands within Washington State or the Department's records, during fiscal years 1988, 1989, and 1990, divided by 3; or

(ii) 15 million board feet.

(2) Such limit shall not exceed such person's proportionate share of 50 million board feet.

(b) *Application, review and approval process.* To obtain a share of the 50 million board feet exempted from the prohibition against indirect substitution in section 490(b) of the Act, a person must have submitted an application. Applications were required to include at least the following:

(1) The amount of volume exception being requested, in thousand board feet (MBF);

(2) A signed certification that reads as follows:

"I certify that, except for an approved share of unprocessed Federal timber, in accordance with 36 CFR 223.203, the prohibition contained in section 490(b) of the Act (16 U.S.C. 620b) applies to me. I have exported unprocessed timber originating from private lands from west of the 100th meridian in the 48 contiguous States and have acquired unprocessed timber from National Forest System lands located within Washington State in 1988, 1989 and/or 1990. I certify that the information provided in support of this application is a true, accurate, current and complete statement, to the best of my knowledge and belief. I agree to retain records of all transactions involving the acquisition and disposition of unprocessed timber from Federal lands within the area involved in this application for a period of 3 years beginning on the date the application is approved, and to make such records available for inspection upon the request of the Regional Forester or other official to whom such authority has been delegated. I make this certification with full knowledge and understanding of the requirements of the Act and do fully understand that if this application is approved, the amount of exception granted under this approval may not be exceeded in any one fiscal year, and do fully understand that if such exception is exceeded I will be in violation of the Act (16 U.S.C. 620, *et seq.*), and I may be subject to the penalties and remedies provided for such violation. Further, I do fully understand that such violation may subject me to the penalty of perjury pursuant to the False Statements Act (18 U.S.C. 1001).";

and

(3) The application listed under this section must have been signed by the person making such application or, in the case of a corporation, by its Chief Executive Officer. The application must have been on the company's letterhead and must have been notarized.

(4) The application made under this section must have been mailed to the Regional Forester in Portland, Oregon, no later than January 8, 1992. Applicants were notified of the approving official's decision by letter. If approved, the amount of the exception becomes effective upon publication in the **Federal Register**.

(5) Prospective applicants could review Department records upon request prior to the deadline for submitting applications. An applicant could voluntarily submit information documenting the amount of purchases of unprocessed timber originating from National Forest System lands within Washington State. The Department then determined which amount is higher, verified by either the Department's

records or the applicant's records. The Department then determined the applicant's portion of the 50 million board feet by determining the lesser of the amount verified by the records or 15 million board feet. Applicants could submit the information documenting the amount of purchases in the following manner:

(i) Actual receipts for purchasing unprocessed timber from National Forest System lands within Washington State; or

(ii) A statement by a certified public accountant of:

(A) A summary by fiscal year for 1988, 1989 and 1990 of the applicant's acquisitions of timber originating from National Forest System lands in the State of Washington, listing total volume for each of the three fiscal years; and

(B) The average volume for the three fiscal years. The volumes to be reported were the harvest volumes, except in the case of open sales. Advertised volumes had to be reported for open sales.

(C) The certified public accountant must have certified to the following:

"I certify that under the penalties and remedies provided in § 492 of the Act (16 U.S.C. 620d) and the penalty of perjury provided in the False Statements Act (18 U.S.C. 1001) that the information provided in support of this application is, to the best of my knowledge and belief, a true, accurate, current, and complete statement of [applicant's company's name] National Forest System timber acquisitions originating from within the State of Washington for fiscal years 1988, 1989 and/or 1990."

(D) The certified public accountant's statement and certification must have been on the accountant's company letterhead, must have been notarized, and must have accompanied the applicant's application.

(c) *Selling and trading rights.* The purchase limit right obtained under this rule may be sold, traded, or otherwise exchanged with any other person subject to the following conditions:

(1) Such rights may not be sold, traded, or otherwise exchanged to persons already in possession of such rights:

(2) Any person selling, trading, or exchanging any or all of the rights obtained under this rule shall advise the Regional Forester of the amount being traded and the name(s) of the person(s) acquiring such rights within 15 days of the transaction; and

(3) No person may have or acquire more than 15 million board feet in one fiscal year.

(d) *Information collection.* The application procedures in this section constitute information collection requirements as defined in 5 CFR part 1320. These requirements have been approved by the Office of Management and Budget and assigned clearance number 0596-0114.

(e) *Persons with approved shares.* The application period for shares of the indirect substitution exception for acquiring unprocessed timber originating from National Forest System lands within the State of Washington closed on January 8, 1992. Persons with approved shares are responsible for monitoring and controlling their acquisitions of National Forest System timber originating from within the State of Washington to assure approved share amounts are not exceeded in any Federal fiscal year. Unused portions of annual shares may not be "banked" for use in future fiscal years. The acquisition of such National Forest System timber must be reported to the Forest Service in accordance with § 223.193 of this subpart. The following shares are approved as of September 8, 1995:

(1) Cavenham Forest Industries, Portland, OR, 1,048,000 board feet.

(2) Weyerhaeuser, Tacoma, WA, 15,000,000 board feet.

## PART 261—PROHIBITIONS

13. The authority citation for part 261 is revised to read as follows:

**Authority:** 16 U.S.C. 551; 16 U.S.C. 472; 7 U.S.C. 1011(f); 16 U.S.C. 1246(i); 16 U.S.C. 1133(C)-(d)(1); 16 U.S.C. 620(f).

### Subpart A—General Prohibitions

14. Amend § 261.6 by adding paragraph (i) to read as follows:

#### § 261.6 Timber and other forest products.

\* \* \* \* \*

(i) Violating the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. 620, *et seq.*), or its implementing regulations at 36 CFR 223.185–223.203.

\* \* \* \* \*

Dated: August 28, 1995.

**James R. Lyons,**

*Under Secretary, Natural Resources and Environment.*

[FR Doc. 95–21912 Filed 9–7–95; 8:45 am]

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